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INFLUENCES ON CANADIAN CORRECTIONAL REFORM

WORKING PAPERS
OF THE
CORRECTIONAL LAW REVIEW
1986 TO 1988

Canada

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Minister's Preface

The *Corrections and Conditional Release Act*, enacted in November 1992, provides the framework for Canada's present day correctional system. Its immediate roots can be traced to 1979, when federal, provincial and territorial ministers responsible for the various aspects of the criminal justice system agreed to a thorough and broad-based study, also known as the criminal law review project. The Criminal Law in Canadian Society, published in August 1982 by the then Minister of Justice, the Right Honourable Jean Chrétien, set the overarching direction for this study. The sweep of the criminal law review project covered all aspects of Canadian law, including sentencing, corrections and conditional release.

The Correctional Law Review, conducted between 1986 and 1988 by a team working for the Solicitor General built on the foundation provided by The Criminal Law in Canadian Society. The working papers of the Correctional Law Review, reproduced here in a single volume, encompass a wealth of information spanning a full range of correctional issues. This work provides a valuable record of the thinking that underlies Canada's correctional law, including its relationship to the *Charter of Rights and Freedoms*.

The Correctional Law Review informed Directions for Reform, the government green paper published in 1990, which put forward proposed legislation to replace the *Penitentiary Act* (1868) and the *Parole Act* (1959). Many features of the new *Corrections and Conditional Release Act* have their genesis in proposals set out in the working papers of the Correctional Law Review. Not the least of these is a statement of purpose and principles for corrections in the context of Canada's criminal justice system.

A special Sub-Committee of the Standing Committee on Justice and Human Rights completed a review of the *Corrections and Conditional Release Act* in May 2000. Their findings endorse the enduring soundness of the purpose, values and principles of the *Act*. This outcome is a legacy of the members of the Correctional Law Review team and those who participated in related consultations. Thanks to their efforts, Canadians have a correctional system that is held in high regard by jurisdictions throughout the world.

As Solicitor General of Canada, I have a profound interest in communicating with Canadians about matters on public safety. This includes making available information about how the correctional system works to protect all Canadians. It gives me great pleasure, therefore, to observe the 10th anniversary of the *Corrections and Conditional Release Act*, by making the collected working papers of the Correctional Law review widely available both in print and in electronic media.

Wayne Easter

Wayne Easter
Solicitor General of Canada

Publisher's Preface

Influences on Canadian Correctional Reform captures in a single volume the working papers of the Correctional Law Review, which was conducted by the Department of the Solicitor General between 1986 and 1988. These documents were seminal to the development of government proposals (Directions for Reform) that led to important changes in Canadian correctional law. But their significance and influence continue far beyond their original publication date.

The working papers of the Correctional Law Review introduced important new and powerful ideas based on a clear perspective of corrections' role in contributing to a just, peaceful and safe society. These ideas continue to guide and influence corrections in Canada to this day. Influences on Canadian Correctional Reform presents the working papers produced by the Correctional Law Review as they were then written but in a more convenient format to allow better public access.

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The project team was assisted by a working group that included Robert Cormier (Programs Branch, Department of the Solicitor General) and representatives from the Correctional Service of Canada, the National Parole Board and the Department of Justice, as listed below:

Correctional Service of Canada:	Daniel Weir Karen Wiseman
National Parole Board:	Gordon Parry Mario Dion
Department of Justice:	Howard Bebbington Fernande Rainville-LaForte

In addition, Amy Bartholomew, Jim Vantour, Don McCaskill and Keith Jobson served as consultants on different discussion papers produced by the working group.

Alan R. Needham managed the Correctional Law Review project in its early development, until his retirement in 1986.

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CORRECTIONAL PHILOSOPHY
Correctional Law Review
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PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal, legislation:

- the *Solicitor General Act*,
- the *Penitentiary Act*,
- the *Parole Act*,
- the *Prisons and Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after-care agencies, victims' groups, an employee's organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

INTRODUCTION

Outlines the aims of this paper which are to:

1 Provide a summary description of corrections in Canada, and the major trends in the development of correctional philosophy;

2 Review the purpose and principles of the criminal law and assess the implications for corrections;

3 Articulate a statement of purpose and principles for corrections, and indicate some of the implications for operations of adapting such a statement; and

4 Discuss whether a statement of philosophy should be placed in legislation.

Part I

Describes the scope of corrections in Canada, and analytically discusses the development of our penitentiary system and the use of parole, as well as the numerous attempts to articulate a correctional philosophy. This part concludes:

- the diverse and contradictory nature of its underlying values and objectives has been apparent since the "invention" of the penitentiary in Pennsylvania in 1818, which was intended to both reform *and* punish wrongdoers.
- although the approach has varied over time, there has always been the fundamental recognition that society is best protected through the reformation of offenders. The purpose of corrections has thus always been thought to be a dual one - to provide secure custody of convicted offenders, while contributing to long-term protection through the rehabilitation of offenders.

Part II

Discusses the fundamental premise of the Criminal Law Review, that Canada needs an integrated criminal justice policy, and reviews the policy document for the Criminal Law Review, *The Criminal Law in Canadian Society* (*CLICS*). *CLICS* concludes that:

- The criminal law and the criminal justice system must pursue two major sets of purposes - "justice" and "security".
- In pursuing its objectives, the criminal law must be guided by the principles of restraint, accessibility, necessity and justice.

In considering the implications of this for corrections, it was concluded that:

- the criminal law sanctions, particularly imprisonment, are always punitive;
- corrections contributes to the security goals of the criminal justice system by incapacitating offenders, and thus providing immediate protection for society, and also by assisting in the personal reformation of offenders, thus contributing to long-term protection;
- the deterrent function of corrections is achieved by the fact of incarceration, and corrections should not try to increase the deterrent effect by making the conditions of confinement more unpleasant and austere than necessary;
- the justice goals of the criminal law - equity and fairness, guarantees of rights and liberties, a fitting response to wrongdoing - all have application to corrections. However they do not form part of the overall purpose of corrections, but rather affect the way in which corrections goes about its business. It is through the application of the justice *principles* that corrections assists the criminal justice system as a whole to achieve its justice *goals*.

Part III

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society.

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

This statement provides explicit direction to corrections as to how it is to achieve the ultimate purpose of contributing to the maintenance of a just, peaceful and safe society. It stresses the need for corrections to be integrated with sentencing policy and practice, and requires corrections to treat offenders fairly and humanely. Public protection is promoted in two ways: through the safe custody of offenders, and through active efforts of correctional staff to return offenders to the community as law-abiding citizens, always taking into account the potential risk to public safety. All correctional activities should be carried out in a manner reflecting the human dignity of all persons and consistent with the principles of restraint, fairness and openness.

Part IV

Concludes that in order for correctional legislation to provide adequate guidance to correctional staff while at the same time leaving them with sufficient discretion to deal appropriately with the variety of daily operational problems, a statement of philosophy should be in legislation.

The statement of philosophy should apply to both federal and provincial corrections, in order to promote a fully integrated criminal justice system.

Summary

Concludes the paper by reiterating the importance of a statement of philosophy to guide the application and interpretation of correctional legislation, and to provide a clear framework for policy development.

The ability to develop correctional law which is credible, effective and which reflects contemporary Canadian values and interests requires the support of the public at large. For this reason, comment and reaction to the concepts put forth in this paper is invited.

INTRODUCTION

This is the first of the Working Papers of the Correctional Law Review Working Group. It is being released simultaneously with a paper entitled *A Framework for the Correctional Law Review*.

As the first step in this fundamental review of federal correctional legislation, it is important to consider what it is that corrections should be trying to achieve - that is, what is the basic purpose of corrections, and what principles should govern its operations. A clearly articulated statement of philosophy will then govern the development of specific substantive proposals, to be developed during the course of this review. In addition, clarity of purpose and principles should permit inmates, correctional staff and the public, as well as judges, to better understand the "meaning" of a sentence of imprisonment in Canada.

Before tackling the substantive areas of the review, such as release and clemency, offender rights, staff powers, victims and the correctional process, etc, the *Framework* Paper referred to above discusses the existing legal framework within which new correctional legislation must be developed, composed of the constitution, including the *Charter of Rights*, the common law, and Canada's international obligations, as well as other federal legislation. In addition there are a number of broad concerns such as consistency and clarity, the desirability of legislation which promotes the appropriate and professional use of discretion, as well as the need for legislation which minimizes litigation.

The discussion in this Paper of a Statement of Philosophy to guide corrections, together with the discussion in the *Framework* Paper about the legal framework and subsidiary objectives such as consistency and coherency, will provide the context for the rest of the review and the development of new correctional legislation.

Part I of this Paper will describe briefly the nature of corrections in Canada, and discuss some of the major trends and their influence on the development of a correctional philosophy. Part II will review the purpose and principles of the criminal law, and assess the implications for corrections. Part III will propose a statement of purpose and principles for corrections and indicate some of the implications for operations of adopting such a statement. Finally, Part IV will consider the appropriate "form" for the statement, that is, should it be placed in legislation or policy, and if the statement is legislated, how, if at all, should it affect provincial jurisdictions.

DEFINITION OF TERMS

Before going further, we think it would be helpful to define our terminology. Distinctions between objectives and principles are difficult to draw clearly - and indeed our own failure to do so adequately in the *First Consultation Paper* may have been responsible for some confusion in that regard in the responses to that Paper. In an attempt to assist respondents in this round of consultations, the following definitions are offered.

An 'objective' is the end to which an activity or group of activities is directed. To some extent it is usually measurable, even though precise measurement may not be possible. All too often, this is the case in corrections.

A 'principle' is a statement of policy at a fundamental level which has broad application throughout an organization. It is essentially a statement about how an organization should go about its business.

In this Paper - and indeed for the entire Correctional Law Review process - 'purpose' is used to signify the overall goal of corrections, together with a statement of the primary ways or strategies in which that goal is to be achieved. Although we could have used the word "objective" instead of "purpose", we prefer to keep objective to describe the individual goal of the various components of corrections, for example, the objective of parole may be quite different from the objective of inmate classification, although both should contribute to the overall purpose of corrections.

'Philosophy' is used as a short form, to denote a statement including both purpose (what is to be achieved) and principles (how it is to be achieved).

PART I: CORRECTIONS IN CANADA

The complexity of Canada's correctional system has been widely noted. It is a highly diverse, dispersed and segmented system in which a wide array of public and professional constituencies participate or have an interest.

By virtue of Canada's constitution, jurisdiction for both the criminal justice system itself and many of its component parts is divided between federal, provincial and territorial governments. The *Constitution Act, 1867* establishes provincial jurisdiction over prisons and reformatories and federal jurisdiction over penitentiaries. The essential difference between provincial prisons and federal penitentiaries is the length of sentences that are served in them. Sentence lengths are determined within the parameters established in the *Criminal Code*, and other federal statutes such as the *Narcotic Control Act*, which is a federal responsibility, by courts that are administered by provincial governments.

Although both federal and provincial governments have legislation governing the correctional matters that fall under their jurisdiction, the federal government is also responsible for the basic legal framework governing offenders serving prison sentences for offences against federal statutes. This responsibility is given effect through the *Prisons and Reformatories Act*. The *Criminal Code* provides that offenders sentenced to two years or more must be sentenced to serve their terms in penitentiary. Those with sentences of less than two years are sentenced to provincial institutions.

The term "corrections" covers a wide variety of institutions, programs, services and activities. There are approximately 12,000 inmates in 60 federal institutions across the country, run by 10,000 staff. There are a further 7,000 federal offenders on some form of conditional release. There are approximately 20,000 inmates in provincial institutions across the country, with approximately 20% in custody on remand. In addition, provincial correctional systems have at any time approximately 77,000 persons serving non-custodial dispositions. These include probation, provincial parole, community service orders, fine options, etc.

Even this description is too general to give a true impression of the diversity in corrections. The federal institutions vary from maximum security institutions with comparatively little programming or inmate movement, to farm and forestry camps, and community correctional centres where inmates work at a variety of jobs in the community but return to the institution at night. Correctional staff, too, have different interests and concerns, from security to counselling, from how to provide the best vocational training to how to provide needed medical or psychiatric services. Provincial institutions, staff and programs are even more diverse.

The segmented or "fractionated" nature of Canada's correctional system and its apparent lack of over-all coordination has been widely criticized by observers calling for greater integration and consistency. It has often been said that the correctional system is not a system at all but only an array of disparate components. However the hallmark of a system is not its internal consistency or coordination but its synergy - the interaction of its parts so that change anywhere in the system affects all the other parts and the balance between them. In this sense the correctional system clearly is "a system". Indeed the most often heard criticism is precisely with regard to change in one component of the system that does not adequately take into account its impact on others.

The comprehensive planning that would be essential to overcome this criticism would require a centralized organizational structure, a uniform statutory and regulatory framework, voluntary subscription of all components to similar objectives and procedures, or some combination of these three.

A variety of community groups and individuals are also involved in corrections at all levels. They participate on Citizens Advisory Committees, on other advisory committees or as volunteers in social, cultural or therapeutic programs. They sit as community members of the National Parole Board, and act as volunteer probation officers. They provide a wide range of services to offenders through such organizations as the John Howard Society, Elizabeth Fry Society, the Salvation Army, Seven Steps Society, Alcoholics Anonymous and many, many more. Others, particularly victims organizations, advocate more effective public protection from dangerous inmates. These and many other organizations and individuals, including other sectors of the criminal justice system such as the police, judiciary and legal profession, hold strong, diverse and often conflicting views about what corrections should be doing. Many correctional programs reflect compromises among these divergent points of view and consequently institutionalize these conflicts. Indeed, it may be that the co-existence of apparently contradictory correctional objectives is a necessary condition to achieve adequate consensus for the use of the state's coercive power.

It is clearly a difficult task to articulate a statement of philosophy which will provide appropriate guidance to, and receive support and agreement from, all parts of this extremely complex correctional system. It is perhaps impossible to expect to articulate a statement which would satisfy all sectors with an involvement or an interest in corrections. In that regard, however, it was encouraging to see the extent of agreement from the respondents to the *First Consultation Paper* on the possible objectives and principles for corrections.

The structural complexity of today's correctional system has evolved over time. However the diverse and contradictory nature of its underlying values and objectives has been apparent since the "invention" of the penitentiary in Pennsylvania in 1818 to reform *and* punish wrongdoers. When Canada's first penitentiary opened its doors a short 16 years later it embodied the same principles and objectives.

Early in the 19th century the Quakers in Pennsylvania reacted against the prevailing punitive and inhumane conditions in the local jails of the day. They argued that a prison should be an institution which promotes reformation through penitence. This "moral treatment" would be achieved through strict isolation, silence, hard work and austere conditions to promote reflection and repentance. This new regime, which was criticized for breaking the spirit and driving many inmates to madness, was at the same time expected to produce disciplined, religious, law-abiding and industrious citizens.

Shortly thereafter, in 1821, a somewhat different approach was taken in Auburn, New York. It adhered to the same principles and objectives of the Pennsylvania or "separate" system but in its "congregate" approach, work was done in association with other inmates. Communication in any form was strictly forbidden and cause for severe disciplinary measures. The innovative feature of communal work was designed to enhance productivity in pursuit of the elusive objective of a "self-sufficient" penitentiary. The consequence of including work with the goals of punishment and reform was to provide temptation and opportunity for communication and other breaches of discipline. This led in turn to increasingly harsh and inhumane punishments in an effort to maintain the discipline and regimentation deemed essential to reform convicts.

In 1835, Canada's first penitentiary was opened in the Upper Canada village of Portsmouth (today's Kingston Penitentiary). It was based on the congregate system which, by then, was becoming the most common North American model (the separate system was adopted in most European countries and in Quebec). During the next few years, Kingston, like Auburn, emphasized maximum employment of, and profit from, convict labor. Also similar to Auburn, the corruption that accompanied the absolute control of the Warden and the cruelty of the punishments used to maintain order eventually led to scandal, public inquiry - the Brown Commission of 1849 - and reform of some of the most atrocious barbarities and corrupt practices. The emphasis on work has continued until today, however, irrespective of the many periods when there has been little productive work to occupy the convict workforce. On such occasions it has usually been deemed preferable to find make-work than to turn to non-work activities. Indeed, it has not been uncommon for educational programs to be limited so as not to conflict with work programs.

During the latter half of the 18th century the Crofton or Irish system came to prominence, was strongly advocated by correctional officials and reformers and had many of its elements introduced in the Canadian system. Based on the earlier work at Norfolk Island Penal Colony of Alexander Maconochie, Sir Walter Crofton introduced in the Irish Prison System a system of inmate grades, earned remission, gradual release, open institutions and parole. These features were strongly advocated by correctional reformers and, by the turn of the century, had been introduced in part to the Canadian system. Earned remission was introduced in 1868 and it and certain other privileges were graduated according to the grade of the inmate, higher grades being earned by good conduct. During the later 1800's, pardons were increasingly used and, in 1899, the *Ticket of Leave Act* was passed to routinize this practice and to more clearly base it on merit. These measures ushered in a new era that increasingly came to rely on individualized case by case assessments of performance and potential to make decisions about the administration of sentences. This new emphasis on individualized measures tended to conflict with notions of a uniform regime that applied to all and also conflicted with the value placed on a highly regimented prison program.

The 20th century witnessed continued development in the social sciences, with the accompanying belief that crime resulted from natural, understandable, and potentially curable causes. This growing confidence, especially following World War II, led to the development of the "treatment" orientation and the growing belief that criminality would be reduced by individualized treatment within prison settings. The promised results of the changing theories were too often naively accepted without being questioned but, on the other hand, were often not accompanied by corresponding changes in practice to give them a fair trial.

In 1938, the Archambault Report[1] found an almost complete lack of programs designed to bring about rehabilitation, although the Report noted in passing that "the difficulty in laying down principles of penology is increased by the fact that it still is the subject of profound and scientific inquiry, and of much controversy, and that, at the present time, many of its problems appear to be practically insoluble."[2]

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[1] Archambault, J. (Chairman). 1938 *Report of the Royal Commission to Investigate the Penal System of Canada.* Ottawa: King's Printer.

Archambault made a series of recommendations that echoed reformers, superintendents of penitentiaries and earlier reports back to the Brown Commission: more central control of all prisons (including provincial), classification of inmates, fair discipline process, control of use of firearms, improved recreation, education, medical and religious services, modernized work activities, prisoner pay, provincial custody for women prisoners, probation, the creation of a Parole Board, assistance to voluntary organizations - all were among the recommendations. Although the Archambault Commission Report was and is regarded as an important watershed in Canadian correctional thinking and practice, it had little immediate practical effect. A revised *Penitentiary Act* was passed by Parliament in 1939, but was not proclaimed in force until 1947. Even then little change was in evidence for at least another decade, but the widespread popular and professional acceptance of the ideas expressed by Archambault is significant. Principles of scientific penology, or principles which were at least believed to be rooted in science, were by then well accepted and paved the way for later practical innovations.

In 1956, the Fauteux Committee[3] found that the reforms recommended by Archambault, most of which had been accepted in the following two decades, were either incompletely or inadequately implemented in practice. It recommended a renewed emphasis on rehabilitative programming coupled with conditional release geared to progress made in treatment. Fauteux's reiteration of these long-standing principles and recommendations coupled with a crushing crowding problem and change of government led to a decade of major change and reform in the federal system. The National Parole Board was created in 1958 to face criticisms for the next few years that they were releasing too few inmates too slowly. Also, perhaps one of the most important yet least known federal committees was appointed - the Correctional Planning Committee. This Committee recommended and rapidly set about implementing an expanded and regionalized penitentiary system of small modern institutions of three security levels, which included specialized institutions such as drug and psychiatric treatment facilities. In the ensuing 10 years the system expanded from nine old maximum security fortresses to a modern diversified system of 33 institutions.

The Ouimet Committee Report[4] in 1969, suggested that the conflict as to the appropriate aims in dealing with convicted offenders was still a major problem for corrections. The Committee stressed the importance of a dual function; to provide security but also to provide long term protection through rehabilitation. Ouimet also stressed the need for an integrated criminal justice policy, and a clearly articulated sentencing policy which stressed restraint in the use of imprisonment. Nonetheless by the 1970's the primary concern of the system was how it could be made to work effectively and as efficiently as possible.

Since 1970, however, there has been growing scepticism about rehabilitation programs and the theories they are based upon which attempt to treat offenders as we treat disease - as problems beyond the offenders' control but which could be corrected by prison authorities. Instead, the

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[2] *Ibid*, pp. 7, 8.

[3] Fauteux, G. (Chairman). 1956 *Report of a Committee Appointed to Inquire Into the Principles & Procedures Followed in the Remission Service of the Department of Justice of Canada.* Ottawa: Queen's Printer.

[4] Ouimet, R. (Chairman). 1969 *Report of the Canadian Committee on Corrections – Toward Unity: Criminal Justice & Corrections.* Ottawa: Information Canada.

Law Reform Commission, in its 1975 *Report on Imprisonment and Release*[5] stressed the need to deal with offenders by encouraging them to accept responsibility, and to provide an environment as close as possible to that in the community. The Law Reform Commission also questioned the use of rehabilitation as a *justification* for sentencing offenders to prison, and again stressed the need for restraint in the use of incarceration.

The current view of rehabilitation has evolved, consistent with the Law Reform Commission's recommendation, towards a model of providing offenders with opportunities to improve their educational, vocational and social skills. Rather than transforming inmates, it is recognized that corrections should not be expected to do more than provide an environment conducive to offenders making responsible choices among reasonable opportunities to help themselves.

Despite the articulation of this policy in 1977 by the *Federal Corrections Agency Task Force Report*[6], there is still no reason to believe that corrections has come to grips with what it should be doing. As recently as 1984, Vantour[7] and Carson[8] observed that there was a poor understanding of the "opportunities model" and how it should be put into effect, although Carson suggested that there appeared to be considerably less confusion than in 1977.

Elsewhere, particularly in some U.S. jurisdictions, there has been disappointment with the results of abandoning the concept of rehabilitation while not having a direction-setting philosophy to replace it. At the present time there may be a willingness to explore the principle of rehabilitation again, in the more realistic light of a clearer understanding of the limitations of rehabilitation theories - as well as the limitations of available alternatives.

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[5] Law Reform Commission of Canada, *Imprisonment & Release*, (1975).

[6] *Federal Corrections Agency Task Force Report*, (1977).

[7] Vantour, J. (Chairman). *Report on Murders and Assaults in the Ontario Region*, (1984).

[8] Carson, J. (Chairman) *Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions*, November, 1984.

PART II: THE PURPOSE AND PRINCIPLES OF THE CRIMINAL LAW AND IMPLICATIONS FOR CORRECTIONS

One of the fundamental premises of the Criminal Law Review was the recognition that Canada requires an integrated criminal justice policy, relevant to the changing needs of modern Canadian society and of individual members of that society.

The concerns about our criminal justice system which led both to the creation of the Law Reform Commission, as well as to major criminal law reform initiatives undertaken in many western countries, were articulated forcefully by the *Parliamentary Sub-committee Report on the Penitentiary System in Canada* (1977) in its conclusion that the criminal justice system "lacks any clear or acceptable governing conception of what we as a society intend to accomplish under the rubric of 'criminality'...and we can only achieve justice, in a rational sense of that very significant term, through a major commitment to fundamental reform .... Reform of our prisons should be no more than one part of a thorough, open and necessarily painful candid assessment of **what the criminal justice system ought to do**." (original emphasis).

As a first step in the Criminal Law Review process, the government published *The Criminal Law in Canadian Society* (*CLICS*) in 1982. This Paper articulated a statement as to the appropriate scope, purpose and principles of the criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings. The statement of philosophy articulated in *CLICS* was designed to govern the approach to more particular issues of criminal law policy, to be determined during the course of the Criminal Law Review. It is thus the appropriate starting point for this Paper.

PURPOSE OF THE CRIMINAL LAW

Although recognizing the conflicts between the retributionists and the utilitarians, *CLICS* suggested that it is possible to accommodate both positions within a policy framework that does not try to provide a moral or philosophical justification for the use of the criminal law power, but instead concentrates on delineating what it is that the use of criminal law should achieve, and how it should carry out its functions. On these latter issues there is a considerably greater degree of consensus. Society expects, suggests *CLICS*, that the criminal law should be used in order to contribute to the protection of society from seriously harmful conduct. At the same time, the inherently punitive nature of criminal law sanctions is recognized, and society therefore also demands that the criminal law be used justly and with restraint.

CLICS therefore concludes that the criminal law has two major purposes:

1 Security goals - i.e., preservation of the peace, crime prevention, security of the public; and

2 Justice goals - equality, fairness, guarantees for the rights and liberties of the individual against the powers of the state, and the provision of a fitting response by society to wrongdoing.

The purpose of the criminal justice system is to be achieved in accordance with a number of principles which reflect contemporary society's values in relation to the criminal law. Some of these principles are designed specifically to guide the criminal justice processes of court and trial, but others are of more general applicability, while some are specifically aimed at corrections. The following principles have some relevance to corrections:

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) wherever possible and appropriate, the criminal justice system should also promote and provide for:

    (i) opportunities for the reconciliation of the victim, community, and offender;
    (ii) redress or recompense for the harm done to the victim of the offence;
    (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

IMPLICATIONS FOR CORRECTIONS

It was suggested earlier that it is generally acknowledged that the criminal law sanctions are, whatever their justifications and whatever their form, at heart punitive. This is of course particularly true for imprisonment.

In earlier times, punishment consisted of an intentionally brutal regimen, which at different times included the tread-mill, the shot-drill, the chain-gang, the rock pile, extended solitary confinement and the rule of silence. Discipline was enforced by floggings and bread-and-water diets.

Conditions today are immeasurably more humane, as even the sternest critics of the system would agree. In fact, it would be fair to say that the present regimen is designed to be humane. Yet it remains punishment.

From the point of view of basic care - accommodation, hygiene, nutrition and essential services - inmates are for the most part provided with a level that usually meets, and may exceed, the United Nations minimum standards. In most institutions inmates are offered a range of programs designed to provide useful work and leisure activities. On a per capita basis, it costs a great deal to house an inmate, for example, an average of $40,000 a year at the federal level. Although this might suggest that inmates are living well, in fact these statistics are misleading, since most of the money spent is to contain and control inmates, not to provide them with goods or services. The largest portion of correctional budgets goes to staff salaries, and the standard of living for prisoners is not much above a basic level.

The real punishment of imprisonment is the loss of liberty. In addition, confinement inevitably carries with it a host of related deprivations: the regimentation, the limitation of choice, the separation from family and friends, the loss of the myriad opportunities that a free society provides for development, enrichment, diversion and profit.

The tension of prison life is debilitating for many inmates - not only the tension between keeper and kept, but the tension of the inmate culture. A certain proportion of the prison population has a propensity for violence - which is why many are behind bars in the first place - and a disconcerting number suffer at one time another from some form of mental or emotional disorder. Having to spend day after day in the close company of such individuals often causes a great deal of stress for those inmates, perhaps a majority, who want nothing more than to serve their sentences without incident.

The question for corrections is two fold: in carrying out the sentence of the court, the "punishment", how can corrections best contribute to the security goals of the criminal law, and in what respects is it constrained by justice goals?

Although all parts of the criminal justice system must be concerned with these two sets of objectives, the balance between them will vary across the system - and indeed will vary with the different functions of a particular component of the criminal justice system. It is therefore important to separate out the implications of these two sets of goals for corrections. In addition, many of the principles articulated in *CLICS* also have implications for corrections.

SECURITY GOALS

The security goals for the criminal justice system as a whole include the preservation of the peace, prevention of crime (whether through pro-active programs or through deterrence), immediate protection through the incapacitation of persons who have committed offences which are seriously harmful or dangerous, and long-term protection through the rehabilitation of offenders. In administering a sentence of imprisonment, the correctional system certainly incapacitates, may also deter, and ideally should promote the rehabilitation of the individuals in its custody.

- **Incapacitation**

Once a sentence of imprisonment is handed down, the correctional system clearly has an obligation to keep the offender safely in custody for the period of the sentence (subject to lawful forms of release), thus preventing further crimes by that offender in the community. The incapacitation of the offender constitutes the punishment, and contributes to the security of society, at least for the duration of the sentence. Consistent with this obligation, corrections must also keep the offenders in a safe environment where opportunities for further criminal acts are minimized. Corrections may achieve incapacitation through other means besides incarceration, such as parole conditions forbidding contact with certain individuals or travel outside certain boundaries, electronic tracking by means of ankle bracelets, or alcohol antabuse substances.

- **Deterrence**

At the sentencing stage, deterrence is one of the purposes of the imposition of a criminal sanction, particularly a sentence of imprisonment. The sanction is imposed to demonstrate the consequences of undesirable conduct, and in so doing it is hoped the offender will be influenced not to repeat the offence and that other potential offenders will be dissuaded from criminal activity.

The notion of deterrence is controversial, inasmuch as many people dispute the effectiveness of punishment as a deterrent. In support of their position, they cite the oft-told story of pickpockets working the crowd at Newgate during the public execution of one of their own number. On a more banal level, they point to the long histories of many repeat offenders, who in spite of the increasing severity of each successive sentence never change their ways. There is in fact some evidence that most important to the deterrence of crime are the probability of getting caught and the witness and certainty of punishment.

It does appear that some offences can be deterred more effectively than others, for example, drinking and driving, particularly in conjunction with roadside checks, and that some offenders may be more readily deterred than others, but no simple cause and effect relationship can be established.

Perhaps the case can best be summed up by the 1967 U.S. President's *Commission on Crime and The Administration of Justice*:

> Deterrence - both of people in general and offenders as potential recidivists and, where necessary, control, remain legitimate correctional functions. Unfortunately there has been little attempt to investigate by research and evaluation the extent to which various methods of handling offenders succeed in these respects. It is no more logical, however, to suppose that various methods operate with uniform effect in deterrence than to suppose that any sort of rehabilitative treatment will work with all sorts of offenders.

It is worth adding, however, that even those who most support the principle of deterrence appear to agree that it is most effective when coupled with speed and certainty of punishment.

To extend this further, it could be argued that if punishment does in fact deter, then the more severe the punishment the more effective the deterrent is likely to be. Carried to its extreme, of course, such reasoning could lead us back to the brutal prison conditions of earlier times, with floggings, maimings and sadistic regimens designed to break both the body and spirit of the offender. In any event, today such treatment would be regarded as offensive to contemporary values - certainly none of the respondents to the *First Consultation Paper* supported such practices. It is contrary to the principles enunciated in the United Nations and other international conventions to which Canada is a signatory, and would contravene the *Charter of Rights and Freedoms*. For the purposes of this discussion, therefore, this type of treatment can be disregarded.

Without going to these unacceptable extremes, however, it would still be possible to make prison a much more unpleasant experience than it already is. This could be done by making the living conditions more austere -accommodations, food, clothing, other amenities - by making the work routine much harder, and by limiting to the barest essentials other programs and social activities and, in general, by tightening the discipline and imposing a much more authoritarian - but fair - regime.

However it is our view that corrections simply cannot make effective distinctions between the punitive and deterrent functions of a sentence. If the judge in handing down a sentence wishes to make a special point about deterrence, it seems more appropriate to do so by making the sentence longer, within the appropriate limits.

In short, it is our view that the primarily deterrent function of corrections arises from the fact of incarceration, and not the conditions of confinement.

- **Rehabilitation**

Although rehabilitation has generally been discredited as a legitimate justification for *sentencing* an offender to imprisonment, no major report has ever recommended an end to rehabilitation as a goal of *corrections*. Even the 1977 Parliamentary Sub-committee, which rejected the use of imprisonment *in order* to rehabilitate offenders, said that flounce a decision to imprison has been taken ..., the correctional techniques employed should be aimed at encouraging and assisting personal reformation by wrongdoers". Thus, imprisonment (and corrections generally) contribute to the protection of society, in the Sub-committee's view, in two ways:

> "Protection of society" as a purpose of imprisonment includes not only protection during a term of imprisonment by the physical removal of a person who is dangerous or who has

failed to respect values that are protected by the criminal law, but also the protection of society after his release by means of a prison system designed to assist him towards personal reformation.

Corrections is the only segment of the criminal justice system which is supposed to assist and encourage the offender to overcome the factors which contribute to his criminality. Other stages in the criminal justice system may occasionally or accidentally have this effect, but it is only after sentencing that any government agency is authorized to try to "treat" an offender. Even in an era of financial restraint, most corrections professionals, academics, and even members of the public still support the principle of rehabilitation, perhaps simply on the grounds that it would be irresponsible and cynical to give up so soon.

Despite the foregoing, it is nonetheless true that during the 1970's in Canada, rehabilitation fell into disfavour as a correctional ideal. The disfavour was on two fronts: first, that rehabilitation had been costly and ineffective, and, second, that it had caused more cruelty and longer punishment than the intentionally "punitive" model which had preceded it.

In fact most of the allegations that treatment is "tyrannical" stem from the study of a few jurisdictions, primarily California and Maryland, and the concerns arose from the use of extremely lengthy or indeterminate prison sentences combined with a highly interventionist treatment philosophy. Nonetheless, there is probably some truth to the notion that offenders see an element of unfairness in almost any attempt to rehabilitate them. After all, virtually any type of personal change is in some respects painful. For offenders, "personal reformation" (as the 1977 Parliamentary Sub-committee on the Penitentiary System put it) can entail a painful and difficult struggle to give up alcohol or drugs, working at a low-paying and unsatisfying job instead of pursuing the risk and excitement of less legitimate earnings, or a protracted process of acquiring new methods of recognizing and dealing with anger and frustration.

Despite this painful element to rehabilitation, however, it is probably fair to say that most people would support rehabilitation if it were proven to be effective and if it did not create excessive additional punishment, costs and risks. How strong is the case, then, that rehabilitation is proven to be ineffective?

Some criminologists have in fact characterized this as one of the greatest over-generalizations in criminal justice. They argue that most evaluated programs in corrections could, in the words of one official, be characterized (as was one particularly well-documented one) as "a poorly conceptualized program that was inadequately delivered by unqualified personnel to individuals who might have been inappropriately assigned to it".

Has "rehabilitation", even in the form just described, been "proven" ineffective, however? Is the evaluative research on programs definitive? Here again, the bulk of expert opinion has it that the quality of evaluative research has, in the main, approached that of the programs themselves. Probably the most authoritative review of the literature, by the U.S. National Academy of Science Panel on Research and Rehabilitative Techniques, conclude that most of the research in the area has been inconclusive if not meaningless, because of poor methodology and a tendency to "evaluate" a multi-faceted correctional experience (such as probation) as if it were a single phenomenon. Very little correctional research to date has been sophisticated enough to differentiate which offenders are helped - and which are made worse - by which techniques under which conditions. Most programs, with good and bad results, thus are felt to have, overall, "no effect".

We are of the view then, that it cannot be concluded that rehabilitation is ineffective. The evidence is too sparse, and the actual attempts to design, fund, and carry out a rehabilitative model for corrections have, to date, been inconsistent and incomplete. Should corrections therefore continue to try to correct offenders?

The best protection for society is widely acknowledged to be the re-integration of offenders into the community as law-abiding citizens. Actively pursuing the goal of encouraging and assisting the personal reformation of offenders, rather than relying on punishment and deterrence to achieve the same goal, is thought by the Working Group to be more appropriate for three reasons.

First, it treats individual offenders as responsible individuals capable of change and taking charge of their lives.

Second, it gives a role to correctional authorities which is positive, humane and which actively supports the long term criminal justice objectives. This role, rather than one which emphasizes the containment of inmates and maintenance of order, is far more rewarding for staff who assume responsibility for assisting and encouraging offenders to take advantage of rehabilitation opportunities.

Finally, the rehabilitative approach holds more potential than a simple punishment/deterrence approach, simply because it recognizes the inevitable reality that there are causal factors which contribute to criminality which no amount of punishment will remedy. By this we mean such things as unemployment, poor impulse control, lack of job skills, low frustration tolerance, functional illiteracy, poor social and problem-solving skills, inability to cope with emotional stress. Many of these problems can be effectively dealt with through teaching offenders cognitive and behavioural skills. Offenders are extremely unlikely to learn the necessary skills themselves, and punishment through deterrence or simple incapacitation will not teach them. Experience also suggests that offenders are unlikely to take advantage of program opportunities unless they are actively encouraged to do so, and one of the most effective incentives to program participation is a high-quality program.

- **Reconciliation**

Reconciliation - of the offender with society, or the offender with the individual victim - has gained greater legitimacy in recent years. Long considered more appropriate to the civil courts which resolve disputes between individuals, restitution to victims as a sentence in criminal matters has grown with the increased recognition of victims' rights in the past decade. In addition, sentences which involve service to the community generally, such as community service orders, have become more common. All these reflect a greater recognition of the need to make reconciliation more prominent as a criminal justice goal.

Once a sentence of imprisonment is handed down, however, reconciliation of offender and victim or offender and community has generally not been seen by correctional authorities in Canada as part of their mandate, particularly at the federal level. Some U.S. states have been experimenting with allowing correctional authorities to put together a restitution or community-service plan for sentenced offenders, and to put this plan before the sentencing judge as a possible alternative after up to three months following initial sentencing. In addition, many correctional institutions encourage offenders to engage in community service work (such as organizing benefits for the disadvantaged) during their leisure hours or, more rarely, during the inmate work-day.

It has been suggested by some groups, particularly Church groups and after-care organizations, that the reconciliation of the offender with the victim and community may play a critical role in the offender's personal reformation and ultimate re-integration in the community.

Quite apart from victim-offender reconciliation leading to the re-sentencing of an offender, victim-offender reconciliation could be encouraged within institutions as a part of the rehabilitative process, that is, encouraging the offender to accept responsibility for his acts. Where individual victims are unwilling or unable to meet with an offender, some reconciliation programs have used substitute or symbolic victims to meet with offenders to talk about the effect on their lives that being victimized has had.

Victim-offender reconciliation could be incorporated into parole planning, for example restitution to the victim if the offender has a job, or some form of service to the victim or to the community.

Reconciliation principles could also be incorporated in the ways in which conflict within institutions is handled. Correctional staff already handle most conflict between offenders, or between offender and staff member, in an informal manner, without resort to formal disciplinary procedures. This could be expanded if correctional staff and inmates are given training in mediation and conflict resolution skills.

- **Conclusion**

It is the view of the Working Group that corrections can and should contribute to the security goals of the criminal law through the incapacitation of offenders sentenced to incarceration and through the provision of a wide range of correctional programs and services designed to encourage offenders to become law-abiding citizens.

JUSTICE GOALS

CLICS suggests that the justice goals include "equity, fairness, guarantees for the rights and liberties of individuals against the powers of the state, and the provision of a fitting response by society to wrongdoing".

Although these goals are clearly articulated in our criminal law, largely as rules of criminal procedure, they are also important for corrections.

- **Equity and fairness**

Equitable and fair treatment is the cornerstone of the "rule of law". In 1977, the Parliamentary Sub-committee described the Canadian Penitentiary Service in the following words:

> There is a great deal of irony in the fact that imprisonment - the ultimate product of our system of criminal justice - itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for ordering a community -including a prison community - according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law.
>
> In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice.

They concluded:

> Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the persons and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.

The situation has clearly changed considerably since these comments were made by the Parliamentary Sub-committee in 1977. The common law notion of fairness has been developed and applied by the Courts to major correctional decisions affecting inmates' lives. The *Charter* extends additional protections to inmates, and guarantees equal treatment. Rules have been developed to cover all aspects of the treatment and custody of inmates - indeed there has been criticism that the pendulum has swung too far, and that an excess of rules governing staff decision-making has removed discretion to the point of impinging on the ability of staff to make professional and appropriate judgements in matters affecting inmates. At the same time, however, the vast majority of these rules are found in Commissioner's Directives and are thus not enforceable by offenders in the courts.

Nonetheless, the rule of law remains an important constraint on the way correctional operations are conducted today.

- **Guarantees of Rights and Liberties**

Protection for the rights and freedoms of individuals, including prisoners, is found in the common law, in the *Charter of Rights and Freedoms*, as well as in various United Nations Treaties and Resolutions which Canada has endorsed, and which provide for certain minimum standards of treatment for prisoners.

Although the *Charter* gives rights to all individuals (in some cases just to citizens) in Canada, and does not specify the precise nature of those rights in the correctional context, it is clear that the *Charter* does apply to prisoners, subject to restrictions on rights upheld pursuant to section 1. In the jurisprudence to date, the courts have been particularly concerned that any correctional decisions which affect a prisoner's liberty, that is to say, any decisions which could either extend the period of his incarceration or place him in a more restrictive environment, must be made in accordance with fundamental justice.

The impact of the *Charter* will be discussed in more detail in later Working Papers on offender rights. For our purpose here it is sufficient to recognize that all of corrections must be brought into line with the *Charter* guarantees of rights and freedoms.

- **A Fitting Response to Wrongdoing**

At the sentencing stage, this requirement of justice implies the need to impose a sentence which is appropriate and adequate given the circumstances of the offence. Anything less would unduly minimize or down-play the gravity of the act. At the same time, the sanction should be the least restrictive alternative which is adequate to protect society's interest - an approach which is frequently described as "restraint" or "parsimony" in the application of the law. As *CLICS* pointed out, however, restraint should not be misinterpreted as leniency. Rather it requires a balance to be sought between leniency and harshness. It implies a fair and appropriate penalty for criminal behaviour.

This suggests that it is important that in carrying out the sentence, correctional officials may not either increase the punishment imposed by the court (the deprivation of liberty), nor may they mitigate it, except in accordance with law. In this regard, conditional release practices have frequently come under attack when critics claim that early release undermines the intentions of the sentencing judge. Although eligibility periods for release are set out in law, and judges may be presumed to know about them when they impose sentences, the perception still exists in some quarters that the degree of flexibility corrections now has to vary the conditions of confinement is simply too great to be consistent with the purpose of carrying out the sentences of the court.

Conversely, restraint requires correctional authorities to justify all restrictions on the rights and freedoms of offenders, apart from their confinement. Obviously the fact of incarceration, and the responsibility of corrections to maintain a safe, orderly environment will, in itself, justify interventions or restrictions on offenders which would not apply to ordinary citizens. It is critical, however, that these restrictions be justified by legitimate or necessary institutional constraints.

- **Conclusion**

It is the view of the Working Group that the justice goals of the criminal law clearly have application to corrections. However it seems to us that they do not form part of the overall purpose of corrections, but rather affect the way in which corrections goes about its business. That is to say they contribute guiding principles which determine the way in which corrections pursues its primary purpose of contributing to the protection of society. It is through the vigilant application of these principles that corrections assists the criminal justice system as a whole to achieve its justice goals.

THE INFLUENCE OF PUBLIC ATTITUDES ON THE DELINEATION OF A CORRECTIONAL PHILOSOPHY

What the public has a right to reasonably expect from corrections should and will affect how corrections views its mandate. First and foremost, the public expects protection from crime, especially violent crime. For corrections, this means carrying out the requirements of the sentence, including the maintenance of a sufficient degree of security to prevent escapes from correctional institutions. It means always having regard for the potential risk to the public interest in all decisions about the treatment and handling of offenders. The public also has a right to expect that the punitive and deterrent aspects of the sentence will be respected by correctional authorities, and that any conditional release from imprisonment following the service of the punitive portion of a sentence will be made in accordance with the overall criminal justice goals of justice and security.

Once a decision has been made by the court to use imprisonment in an individual case, the public also has a right to expect that what goes on inside institutions will be optimally directed towards reducing the offender's chances of coming back. The 1977 Parliamentary Sub-committee on the Penitentiary System said that "society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes - correcting the offender and providing permanent protection to society". The Sub-committee went on to recommend both the availability of more community-based alternatives to incarceration, and the wiser use of the time which imprisoned offenders spend incarcerated. In the Sub-committee's view, imprisonment too often becomes just a very expensive warehousing operation. "Personal reformation" instead was what the Sub-committee felt should be the goal of prisons. The public too has a right to expect more for its imprisonment dollars than a revolving-door warehouse.

The public also reasonably expects that its tax monies will be spent in the most effective possible way. Public attitude surveys suggest that it is violent crime which most concerns Canadians, and that the public is more willing to accept non-carceral handling of non-violent offenders than many criminal justice professionals assume. This is a reasonable approach, especially in view of the high costs of imprisonment. As competition among social programs for increasingly scarce tax dollars increases, it makes sense to reserve the most costly correctional intervention for those who most deserve or require it.

PART III: A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

Given the foregoing discussion, what can be said about the appropriate purpose of corrections, and the appropriate principles to govern its operations? One thing is clear: that it is important for the goals of corrections to be well understood. When they are not, the results can be disastrous for the entire system. This is how the 1977 Parliamentary Sub-committee described the effect of a lack of mission on penitentiaries, but the effects on community-based corrections can be equally serious, if less dramatic:

> ... This fundamental absence of purpose or direction creates a corrosive ambivalence that subverts from the outset the efforts, policies, plans and operations of the administrators of the Canadian Penitentiary Service, saps the confidence and seriously impairs the morale and sense of professional purpose of the correctional, classificational and program officers, and ensures, from the inmate's perspective, that imprisonment in Canada, where it is not simply inhumane, is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country.

The *First Consultation Paper*, in which the initial exploration of philosophy took place, listed for comment 16 objectives and 17 principles. These were drawn from multiple sources, including many of the documents already referred to in this paper. As we noted earlier in this paper, this led to some confusion about the distinction between objectives and principles. Nonetheless, the responses proved of value when, in light of our earlier discussions, the new statement was developed.

Overall, it is fair to say that there was general agreement with most of the objectives and principles listed in the *First Consultation Paper*, although sometimes with reservations. The degree of consensus is encouraging, but at the same time we are mindful that even with substantial agreement with the elements of a statement of philosophy, there can still be significant disagreement about the importance of the elements.

Rather than using the terminology of the *First Consultation Paper*, the Statement of Philosophy which follows adopts the approach taken in *CLICS* which is to define the Purpose of Corrections, consisting of the overall goal of the correctional system, together with the major strategies or ways of pursuing that goal, and then a list of principles which provide guidance as to how corrections should pursue the strategies listed in the Statement of Purpose. Adoption of this Statement of Purpose and Principles will then have implications for all correctional activities. Each will have its own objective, which should contribute to the overall purpose of corrections.

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society.

This restatement of correctional purpose emphasizes the multifaceted nature of corrections in modern society, as well as *CLICS*'s vision of the dual nature of criminal justice goals: security and justice.

Because of the complexity of corrections, it would be unrealistic for corrections to pursue any one strategy, such as punishment or rehabilitation, to achieve its ultimate goal. Not only does society demand more, but the vast differences in the risks and needs presented by different offenders demand a flexible approach. At the same time, the overall purpose for corrections is the same as the overall purpose of the criminal law, "to contribute to the maintenance of a just, peaceful and safe society."

The first component of the purpose, (a) speaks to the need for corrections to be part of an integrated criminal justice system. As we saw earlier, it is critical that each component of the system operate within the same policy framework, pursue the same ultimate goal, with a clear understanding of what the other components can and should do. This requires communication, both in relation to the functions, capabilities and resources of the various components of the justice system, and also with respect to the treatment of individual offenders.

Corrections thus relies on judges to be open and explicit about the factors influencing their decision to incarcerate, and requires also that they have an understanding of both the purpose of corrections and the resources available to it to carry out its functions. Conversely corrections should be under an obligation to communicate clearly how it operates, the criteria for major correctional decisions and the kinds of programs and services available to offenders. In administering the sentence, correctional authorities must consider the stated reasons for sentence as well as relevant material presented at trial or at the sentencing hearing, although they will also be guided by considerations of equity (vis-à-vis other offenders), changes in circumstances over time, resource constraints, etc.

To comply with this component of the purpose, some mechanism for communicating information to the judiciary about corrections will have to be developed. This could serve the dual purpose of informing judges about the kinds of programs offered in institutions and in the community, and about how the various release programs operate, and in addition, judges could use the forum to explain why and how certain factors influence sentencing decisions.

Components (b), (c) and (d) of the Purpose reflect the need to respond to individual offenders. For some offenders, the seriousness of their crime simply requires punishment, even if there is no risk that they will offend again. For them, incarceration, with its inevitable measure of painfulness, will often be the only possible response. Even where these individuals require no "rehabilitation", however, corrections is under a positive obligation to ensure that they are discharged no worse than when they were sentenced, and are no less able to function productively in society after release. In addition, the public demands protection from offenders who present a high risk, especially a risk of violence, even if the offence for which they were most recently convicted is not exceptionally serious. For those offenders who are considered dangerous, incapacitation (normally by way of incarceration) is the primary correctional goal, and risk assessment must inform all correctional decisions.

This implies continuing efforts to develop more accurate and sophisticated methods for risk assessment. In addition, corrections would have to explore different ways of *controlling* risk. Recent studies and reports on the Correctional Service of Canada have stressed the need for "dynamic" rather than "static" security to control inmates. There is a growing recognition that imaginative programming, as well as the active involvement in programming of all correctional staff, is not only appropriate from a rehabilitative perspective, but is also effective to reduce tension levels in institutions and the risk presented by offenders.

Similarly for parole and probation, it may be the case that more imaginative and individually designed supervision conditions would permit more offenders to remain safely in the community.

A large number of offenders come into the correctional system with multiple problems which may contribute to their criminality: chronic unemployment, little education, few job skills, perhaps learning disabilities, alcoholism, difficulty in dealing with social services, family problems, poor coping abilities. Society has a right to expect that corrections will make an effort to help the offender deal with these problems. Thus, for those offenders who need it and are receptive to it, corrections should also offer opportunities in the form of appropriate programs, and actively motivate offenders to take advantage of them.

Because of the focus of this strategy on return to the community, it is important that the programs developed by corrections focus on skills necessary for life on the street. Vocational skills should relate to work opportunities in modern society, and it is important that training programs meet outside certification standards.

Additionally, this strategy defines an active role for correctional staff as motivators and encouragers. This is not confined to the "treatment personnel" but should extend to all staff who have contact with offenders. This may require changes in job descriptions, and will involve an additional emphasis in job training and development on counselling and communication skills, problem solving and peaceful dispute resolution.

Equally important are the strategies identified in (d) which require corrections authorities to respond to the individual needs of offenders. In addition, the important role of release planning is highlighted. This strategy may have implications for the allocation of program opportunities in different types of institutions. Those offenders considered to require a high level of control and who are then placed in maximum security institutions may also frequently be characterized as "high need" offenders. Typically, however, there are more program opportunities in less secure facilities.

These goals are primarily "security" goals. However, our proposed statement of correctional goals also encompasses "justice" objectives which require that the correctional system take care of the basic human needs of offenders. For those put in prison, these needs are extensive; shelter, food, exercise, medical and dental care, protection from other prisoners. It is also necessary to ensure that this environment is conducive to active program participation.

For offenders in the community, it is usually not necessary for corrections to provide these services directly. But many offenders in the community need assistance, initially at least, coping with the basics of life - finding a job, making a good impression on the job, establishing a budget, even eating an adequate diet. Without becoming a substitute for existing social services, correctional workers will often find themselves advising offenders on how to make use of educational, vocational and other opportunities in the community, sometimes acting as a liaison between the offender and the elements in the community with which he must interact successfully in order to survive.

As *CLICS* suggested, it is clear that the "security" goals of corrections and the "justice" goals of corrections are inextricably interconnected. The basic human needs and life skills just described are a good example. While they *must* be met as part of a just and humane correctional system in a modern, complex society, they *should* be met for the additional reason that an offender who cannot cope with the basics of his own life is far more likely to be unable to stay out of trouble with the law.

A STATEMENT OF PRINCIPLES

Given our starting point that incarceration is, by its nature, punitive, what principles are necessary to establish the appropriate level of punitiveness? In addition, what principles are required to provide positive guidance to correctional staff in carrying out their mandate?

Perhaps the first question which logically arises is: To what extent, if at all, are the rights of the offender as a citizen curtailed by the fact of conviction and sentence of incarceration. The concept of civil death was abolished in Canada in 1892, thus permitting offenders to retain the right to own property. However a number of civil rights are still explicitly removed by legislation, such as the right to vote, the right to hold public office, the right to certain future employment and licences, the right to remain in Canada in certain circumstances. Other rights have been held to be implicitly removed or restricted by virtue of incarceration: freedom of movement or association, use of the mails and telephones, or the right to marry.

The Supreme Court of Canada, in the case of *Solosky and the Queen*, reiterated that at common law, inmates retain all their civil rights other than those expressly or impliedly taken from them by law. This position is developed further by the *Charter*, which extends its protections to inmates, subject only to restrictions prescribed by law pursuant to section 1. These restrictions must, however, be *demonstrably justifiable*.

Many of the specific rights referred to in the *Charter* would touch on correctional authority: freedom of association, the right to vote, mobility rights, the right to life, liberty and security of the person, security against unreasonable search and seizure, and freedom from cruel and unusual treatment or punishment.

Section 1 of the *Charter* will increasingly mean that the burden will fall on government to articulate and "demonstrably justify" the limits which it wishes to place on offenders' rights. These limits will, furthermore, have to be stated in law.

This apparent *Charter* trend is echoed by the *CLICS* principle (a) that the criminal law should be administered "in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose". Indeed, fairness suggests that we should not *arbitrarily* limit the civil rights of offenders, although we must recognize that some restrictions are a necessary consequence of a sentence of imprisonment. One principle, therefore, which should govern punishment could be stated as follows:

1 **Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.**

From an operational point of view, this principle could have an impact on numerous correctional activities. Correctional authorities will have to look at each restriction imposed on offenders and determine if the limitation is necessary to the protection of the public or necessary for the good and safe functioning of the institution rather than just a matter of administrative convenience. The starting point in this analysis will be that an offender has all the rights and privileges of an ordinary citizen - for example, mobility rights to move from one place to another. Given the fact of incarceration, mobility rights are necessarily restricted. However, applying principle 1 will mean that mobility may only be restricted to the extent which is absolutely necessary to maintain a secure institution, and run a correctional system.

Since mobility rights are protected by the *Charter*, any limitation on those rights must also be set out in law. It will thus be necessary to ensure that these limitations are provided for in statute or regulation rather than administrative directives.

This principle also recognizes the need for clarity and certainty in relation to all matters affecting rights, and requires that all such matters be set out in law.

As matter of policy, however, corrections is still faced with numerous operational choices - such as the deliberately unappealing but nutritious diet - which do not reach the level of legal rights. In other words, most of the daily operational issues of corrections are more a matter of social policy than legal requirement, although at a certain point, the conditions of confinement could be made so unpleasant as to offend our sense of humane treatment. They could also constitute cruel and unusual punishment, and thus be subject to attack in the courts. We are thus still faced with the need for principles to govern the punitiveness of corrections: i.e., should corrections impose punishments beyond what is implied, of necessity, in the sentence. "Punishment", of course, is difficult to define; what is an administrative necessity to a warden might be seen as punishment by a prisoner. Moreover, the overall level of government spending on corrections will, to some extent, affect the punitiveness of certain correctional environments.

Some authors have suggested that corrections has no authority to impose additional punishments, that only a judicial officer may do so. The 1977 all-party Parliamentary Sub-committee on the Penitentiary System in Canada took this view:

> "The mere fact that an individual is sentenced to incarceration constitutes the punishment for his offence, since the sentence inherently means that the offender will, for a certain length of time, be restricted in his freedoms of movement and association. The Penitentiary Service is neither required nor authorized to levy further sanctions against the inmate, unless he in some way violates the rules of the institution. The inmate has the right at all times to expect humane treatment and living conditions, and as much liberty as can be permitted by the requirements of security. There must be a clear distinction made between punishment and vengeance. Punishment is the means by which society expresses its disapproval of the behaviour of one of its members. Vengeance is a much more primitive and illogical reaction to offensive behaviour, and has no place in the correctional practices of an enlightened nation. In cases where imprisonment is determined to be the appropriate response to criminality, in light of the purposes of imprisonment we have stated, we recommend that the following principle should govern behaviour by all officials in the penitentiary system:
>
> > The sentence of imprisonment imposed by the court constitutes the punishment. Those who work in the penitentiary system have no authority, right or duty to impose additional penalties except for proven misconduct during incarceration."

The social policy view of the Sub-committee is shared by many. In Britain, this view is phrased differently: that the criminal is sentenced "as punishment, not for punishment". Similar wording to convey the same notion can be found elsewhere among Western democratic nations. For our purposes, the idea might be phrased as follows:

2 **The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.**

This principle deals only with the punishment deriving from the sentence. On its own, therefore, it may give the impression that no other punishment can ever be meted out. In fact, punishments can and often do result from disciplinary infractions, and this needs to be made clear. Further, it is possible that the imposition of controls could be construed as a form of punishment. For instance, transferring an inmate to a higher level of security, or suspending or revoking parole or mandatory supervision necessarily carry with them connotations of punishment for failure to behave in an acceptable way or to comply with certain conditions. Therefore, when additional punishment is in fact imposed on an inmate, it must be done in accordance with the law:

3 **Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.**

This principle affirms the current situation which has developed through the application of the common law duty of fairness, and more recently through section 7 of the *Charter* (the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice). From an operational point of view, this will require certain procedural rules and possibly substantive guidelines for processes which involve punishment. Where a significant loss of liberty is a possible consequence, a hearing will be necessary and possibly the right to legal representation.

Even once the question of additional punishments has been settled, however, the reverse side of the question presents itself: Should the more drastic modes of corrections, such as imprisonment, be under an obligation to identify and counteract as far as possible the artificial, debilitating and painful aspects of the correctional environment?

The goal of restraint, discussed earlier in this paper (Justice Goals), is appropriately incorporated here. It might be stated as follows:

4 **In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, and consistent with public protection and institutional safety and order.**

The implication of this principle, taken together with others, is that corrections would have the burden of demonstrating why a given correctional environment should not, either in general or in respect of a particular offender, approximate the conditions and freedoms of society generally. If there are two ways of accomplishing the same end, but one impinges considerably less on the offender's rights and interests, it is the less drastic course which should be chosen unless there are defensible reasons to reject it. A good example is the need to have identifiable photos of all inmates in order to assist in finding an escaped convict. One way to ensure an inmate will not be able to use facial hair to thwart identification is to require all inmates to remain clean-shaven at all times; a less restrictive option is to take photos of an inmate with and without facial hair, if he wishes to grow a beard or moustache. The same principle of restraint can apply to much more significant questions of initial placement in maximum, medium or minimum security, as well as transfers, choice of treatment program, and conditions of release.

Finally, it is necessary to delineate a few principles respecting the procedural implications which follow from these substantive principles. As seen from *CLICS*, there is the need for principles respecting the day-to-day decisions of correctional authorities. Most decisions which extend or limit the punitiveness of the correctional environment will, as we have discussed, be taken by administrative rather than judicial authorities. The Working Group recognizes the essential role of discretion in corrections. As we discussed in more detail in the *Framework* Paper, discretion may be seen as both harmful and helpful; it may be regarded as a threat to individual rights, and at the same time as the necessary means to achieve humaneness and flexibility.

The answer is not to eliminate discretion, but rather to attempt to confine and structure discretionary power. This can be achieved partly through a clearly articulated statement of purpose and principles which provides all those working in corrections with a framework for decision-making. In addition there is a need for a system of legal and administrative rules to govern the exercise of discretion at critical points in corrections. The system of rules must recognize the importance to offenders of many decisions made by correctional authorities, particularly those related to the liberty of the offender, such as parole and discipline decisions. Since the basis of these decisions should, at a minimum, be open and decision-makers should be accountable, our principle respecting decision-making could be phrased as follows:

5 **Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.**

Operationally, this will mean that rules must be developed (and made available to staff and offenders) as to the informant upon which a particular decision may be made, as well as rules regarding the giving of reasons for decisions, and the development of guidelines for important decision-making processes such as parole and initial classification. Generally, correctional operations should be characterized by a willingness to explain the basis for decisions affecting both individual offenders and operations as a whole, and to listen to the positions or views of those affected by the decisions.

Correctional decisions which affect important interests of offenders, particularly their liberty, are increasingly subject to judicial review, as a result of both the *Charter* and the common law duty of fairness. Litigation, however, is recognized to be particularly costly, slow and (often for reasons of slowness alone) ineffective to serve as an adequate remedy for the hundreds of decisions made daily by correctional authorities in relation to inmates. For this reason, it is becoming increasingly necessary to establish effective grassroots dispute resolution mechanisms in corrections which are both fair and - equally important - perceived to be fair by offenders under correctional control. Our principle might then read as follows:

6 **All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.**

Grievance procedures are now recognized as an integral part of modern correctional systems. However it is important to evaluate the effectiveness of programs already in place, to ensure that they meet the objective of speedy and appropriate problem-solving within a process which involves the parties to the dispute or problem.

To promote the restoration in the community of offenders, the public, both general and specialized, should be encouraged to participate in the programs which are aimed at the offender. By this means, offenders will come into more contact with normative role models and are more likely to be treated in ways which reflect the community at large, rather than ways which reflect the correctional environment:

7 **Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.**

On an operational level, this principle implies the development of public education programs and the recruitment of lay people for involvement in prison and release programs (Citizen Advisory Committees, volunteer parole supervisors, participation of community service clubs). Also the participation of private citizens in important correctional processes such as parole and disciplinary hearings would be encouraged. Continued an increased involvement of private agencies would be indicated, as well as the expanded use of existing social services in society to promote integration with the community.

In our opinion, the principles as proposed now reflect the consensus of the respondents. Nonetheless, they may go further than some feel warranted and not as far as others feel necessary.

Further, they do not, it should be pointed out, reflect the distinction between violent and non-violent offenders that the victims' groups feel is so important. This does not mean we are unsympathetic to their concerns about public protection - in fact we share them - but we believe that component (b) of the Purpose, which establishes the importance of risk assessment of offenders, is the best way to meet the concerns expressed most strongly by the victims' groups and, to a lesser extent, by some of the other respondents.

Not discussed in the *First Consultation Paper* as a possible principle was the role of correctional staff in achieving the overall purpose of corrections. The working group recognizes that in order for new correctional legislation to have an impact on correctional operations, the proposals must be fully supported and actively implemented by correctional staff.

The purpose of corrections as articulated earlier in this paper recognizes the fundamental role of staff in implementing all of the strategies identified as contributing to the overall goals of the system. The strategies rely on personal interventions and interaction, rather than increasingly sophisticated technologies and facilities. We therefore propose the following principle:

8 **The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.**

This principle reinforces the earlier discussion with respect to the purpose of corrections. It implies a recognition of the responsibility of all correctional staff to encourage and assist inmates to adopt acceptable behaviour patterns. Job descriptions may have to be changed so as to emphasize this role as part of all correctional staff positions, and appropriate staff training must support it. Above all, this principle means that staff must be used to their full potential in the correctional process, not relegated to professional lives which consist primarily of custodial and paperwork functions. Correctional resources are too valuable - and increasingly scarce in this era of fiscal restraint - for corrections to make less than full uses of the skills and sometimes untapped talents of all its members.

Finally, we considered the inclusion of a principle which recognized the reality of economic restraint, which has affected corrections in the same way as it has all other aspects of Canadian life. Cost-benefit analysis is an essential part of any operation, including corrections. For instance, this principle could influence a decision to prepare inmates for release (assuming there are release programs) as soon as possible after their eligibility dates, provided they pose no undue risk to the public. On the reverse side, of course, the application of the principle could result in the cancellation of certain programs which are more costly than others or which reach only a small number of offenders with special needs.

Despite the importance of the notion of cost-effectiveness, it is our view that this necessarily applies to all operations, public and private, and thus does not require re-stating here.

The preceding set of principles are proposed with a view towards further consultation with interested groups. Additional refinements will no doubt be made during the forthcoming round of consultations.

PART IV: THE ROLE OF A STATEMENT OF PHILOSOPHY

The final issue for consideration is what role the statement of philosophy should play in the new correctional legislation. Should it be a matter of policy, which guides the development of the substantive provisions but is not itself legislated? Or should it be included in the legislation?

If the latter, further questions arise about the ambit of such legislation. Should the statement be in federal legislation which applies to both federal and provincial jurisdictions or should it govern the federal system only, leaving provincial jurisdictions to legislate it or not, as they choose?

In the paper *A Framework for the Correctional Law Review*, which was released simultaneously with this one, we discuss the different approaches that could be taken to drafting legislation in order to develop a scheme which best reflects the philosophy of Canadian corrections and which facilitates the attainment of correctional goals and objectives. We suggest in that paper that we want new correctional legislation which gives guidance to correctional staff and promote fair and effective decision-making; it should facilitate operations and be clear and unambiguous; it should be internally consistent; it should promote the dignity and fair treatment of inmates; and reflect the interests of staff, offenders, and of all others affected by the correctional system. The legislation should be perceived by inmates, staff and the public as fair and reasonable. What kind of legislation would best achieve these goals?

As is discussed in more detail in the *Framework* Paper, it is clear that new correctional legislation must establish the correctional agencies and authority for their functions in law, provide for the principle features of major correctional activities and programs, and provide for all matters of rights. This can be done, however, in a number of ways, ranging from very general provisions leaving correctional authorities maximum authority, to very detailed codes of procedure governing all correctional decisions and provision of services.

It is our view that in order to provide sufficient guidance to the correctional system to ensure that correctional operations are conducted in conformity with Parliamentary intentions and in conformity with publicly supported correctional policy, while at the same time leaving sufficient flexibility in the hands of correctional authorities to control operations, it would be preferable to place the statement of philosophy in legislation, together with specific objectives for each major correctional program or activity (such as parole, security clarification, discipline, remission, etc.). Detailed matters can be left to subsidiary legislation and policy, although this must still be consistent with the legislated philosophy and program objectives.

Finally, it is also the view of the Working Group that the statement of philosophy should apply to corrections at both the federal and provincial levels, in order to promote a truly integrated criminal justice system.

SUMMARY

In this paper, we have developed a statement of purpose and principles for corrections in Canada, which we propose should be put in legislation. This statement would serve to guide the application and interpretation of the legislation, and would provide a clear framework for policy development.

The statement stresses the need to treat offenders fairly and humanely, and places an onus on correctional authorities to actively assist offenders to prepare for their future release back to the community. At the same time, risk assessment must always play an important role in all correctional decisions.

In developing this statement, the responses we received to the *First Consultation Paper* were extremely helpful. Indeed the degree of consensus among respondents was particularly encouraging, given the diverse views expressed on other issues. We therefore hope that this paper, which is so fundamental to the Correctional Law Review as a whole, will attract an even wider response.

As we have stated earlier, written comments on this Paper are invited, and the Working Group will meet to discuss all of the Working Papers with any group or individuals who wish to do so during the public consultations in the winter of 1986-87.

APPENDIX "A"

List of Proposed Working Papers of the Correctional Law Review

Correctional Philosophy

A Framework for the Correctional Law Review

Release and Clemency

Staff Powers and Responsibilities

Sentence Computation

Native Offenders

Offender Rights

Mentally Disordered Offenders

International Transfer of Offenders

Victims and the Correctional Process

The Relationship between Federal and Provincial Correctional Jurisdictions

A FRAMEWORK FOR THE CORRECTIONAL LAW REVIEW

Correctional Law Review
Working Paper No. 2,

June 1986

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the *Department of the Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons & Reformatories Act*, and
- the *Transfer of Offenders Act*

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.[1]

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after-care agencies, victims' groups, an employees organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers, to be released during the summer of 1986. A list of the proposed Working Papers is attached as *Appendix B*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor-General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the Government. The responses received by the Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

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[1] For example, the *Canadian Bill of Rights* and the *Canada Elections Act*

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the aim of the Correctional Law Review, which is to develop a framework for corrections that accomplishes the following:

(i) reflects the philosophy of Canadian corrections,

(ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and
(iii) facilitates the attainment of correctional goals and objectives.

The main concern of this paper is the form and, to some degree, the substance of a legislative framework which would accomplish the above, and would, as a result, provide consistency and continuity among pieces of legislation and parts of the system, promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to correctional staff, promote the dignity and fair treatment of offenders, and reflect the interests of staff, offenders, and all others affected by the correctional system.

PART I

Examines the characteristics of rules currently governing federal corrections. These rules have several sources - the constitution, which includes the *Canadian Charter of Rights and Freedoms*; international law; legislation; and judicial decisions. The legal nature of other rules which shape our system, found in Commissioner's Directives, policy and procedure manuals, and sets of standards, is discussed.

This Part concludes with an assessment of our present legislative scheme. A number of general deficiencies which underlie more specific problems are identified:

- correctional legislation lacks a statement of philosophy or principles to guide its interpretation and application;
- correctional legislation represents an accumulation of incremental changes made by way of *ad hoc* amendments since the *Penitentiary Act* was first adopted in 1868;
- as a result correctional legislation is out-dated, confusing and inadequately related to current realities.

PART II

Examines the constitutional and other aspects of our justice system that must be taken into account in developing a legislative scheme to govern corrections.

Identified as playing a major role in shaping the form and content of correctional legislation are:

- the *Canadian Charter of Rights and Freedoms*,
- Canada's international obligations in regard to corrections,
- the constitutional split in jurisdiction between the federal and provincial governments, and
- the philosophy of Canadian corrections.

PART III

Addresses the central question of how best to achieve in law the specific goals of the Correctional Law Review. Discussion focuses on two main goals:

1) developing legislation which promotes voluntary compliance with its provisions:

   - the interests of offenders, correctional staff and the public are examined and it is determined that although each group has concerns which must be addressed, and even though the interests of staff and inmates are in many ways inherently conflicting, there are many areas where their interests overlap and converge, most notably in the shared interest amongst both guards and inmates in a secure, smooth-running institution. It is concluded that in devising rules to govern the institution, priority ought to be given to compliance enhancement techniques emphasizing participation and cooperation rather than confrontation.

2) furthering fair and effective decision-making:

   - discretion and accountability in corrections are examined, and it is concluded that an appropriate balance between discretionary power on the one hand, and formal rules on the other, must be found, to ensure that discretion can operate according to clearly stated principles and objectives in order to present the greatest degree of flexibility while ensuring the greatest possible degree of accountability;
   - to accomplish this, there is a need for a clear statement of philosophy in law which would contribute to the use of discretionary powers according to legitimate and clearly established principles, rather than according to the unguided and potentially arbitrary feelings of an individual decision-maker.

PART IV

Compares the relative advantages and disadvantages of various approaches to codification and concludes that rather than developing an exhaustive code of detailed legal rules to govern conduct in every situation, the goals of the Correctional Law Review would be better met by including in legislation a clear statement of correctional philosophy from which legal and policy rules are derived and which will guide their interpretation and application.

In considering the question of which matters should be included in statute and regulation, and which in policy, it is concluded that the statute should:

- contain a statement of philosophy;

- establish the agencies and authority for their functions;
- contain the objectives as well as the principal features of agency functions and activities; and
- provide for the protection of individual rights in the correctional context.

Regulations would complement and particularize the statute and flesh out the details of many of the statutory provisions.

Policy directives should be reserved for matters of a routine management nature involving day to day operations, and should not have the authority to limit offender rights, nor should they be relied on as the sole source of offender rights since they are not legally binding or enforceable at the instance of an offender.

In considering whether our legislative framework would have an effect on litigation, it is concluded that our approach which is to develop a reasonable, balanced system of rules beforehand that

- controls discretion and takes into account the interests of all those affected by the system,
- articulates in clear terms the philosophy of Canadian corrections and the rights protected by the *Charter* in the correctional context, and provides for effective grievance procedures,

should reduce the need for resort to the courts, while at the same time providing for "justice within the walls".

A FRAMEWORK FOR THE CORRECTIONAL LAW REVIEW

INTRODUCTION

As noted in the Preface, the mandate of the Correctional Law Review is very broad. The Review encompasses much more than a mere review of correctional legislation: it is an in-depth examination of the purposes of corrections and a determination of how the law should be cast to best reflect these purposes. The first Working Paper of the Correctional Law Review Working Group examined issues relating to the philosophy of corrections. *A Framework for the Correctional Law Review* is the second of the Working Papers; it provides a framework for carrying out the future work of the Correctional Law Review.

The ultimate aim of this whole endeavour is to develop a framework for corrections that accomplishes the following: (i) reflects the philosophy of Canadian corrections, (ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and (iii) facilitates the attainment of correctional goals and objectives. Such a framework is intended to provide continuity and consistency among pieces of legislation and parts of the system, to promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to correctional staff, be internally consistent, promote the dignity and fair treatment of offenders, and reflect the interests of staff, offenders and of all others affected by the correctional system. A balancing of interests of these groups is critical if the legislation is to be fair and reasonable. This is, in turn, necessary if the legislation is to be effective; that is, if it is to be accepted and, for the most part, voluntarily complied with and have the necessary public support.

The main concern of this paper is the form and, to some degree, the substance of a legislative scheme that would best accomplish all these goals. In arriving at such a scheme, the current framework of rules governing federal corrections will first be examined and assessed. Following this, the key elements that shape both the form and substance of a piece of correctional legislation will be discussed. Of major importance is the constitution, which includes the *Canadian Charter of Rights and Freedoms*. Other key elements to be discussed are the international law obligations Canada has undertaken in regard to corrections, and the implications of the constitutional split in jurisdiction between the federal and provincial governments. The section will conclude with a discussion of a statement of philosophy of corrections.

The central question of how best to achieve in law the goals of the Correctional Law Review will then be considered. The interests of all participants in the correctional system will be examined in an effort to promote voluntarily compliance with the legislation to be developed. Achieving a further goal, fair and effective correctional decision-making, will also be discussed. We will be comparing the relative advantages and disadvantages of detailed codification as opposed to more general legislation. This will include an examination of two important questions: first, whether it would be appropriate or desirable to put a statement of philosophy and objectives in legislation and second, which substantive or procedural matters should be put in legislation or regulation and which should remain matters of policy. In this connection, the issues of discretion and accountability will be discussed. The task here is to determine the level of codification that would promote the best correctional decision-making - that is, decisions which further the fundamental goals of the system.

In conclusion, a framework or approach will be proposed that will be applied in a subsequent series of Correctional Law Review papers. These papers will deal in depth with specific corrections issues in the areas of release and remission, offender rights and remedies, powers and responsibilities of correctional staff, native offenders and corrections, mentally disordered offenders, and so on. The papers will identify issues and explore options consistent with the stated principles in an effort to ensure that all aspects of drafting new legislation will be fully canvassed.

PART I: PRESENT FRAMEWORK: RULES GOVERNING CORRECTIONS

The rules which currently govern the federal correctional system have several sources - the constitution, which includes the *Canadian Charter of Rights and Freedoms*; international law; legislation, consisting of statutes and regulations; and judicial decisions involving the application and interpretation of all of these as well as the development of the common law. Other rules which shape our system are found in Commissioner's Directives, policy and procedures manuals, and manuals of standards. This part examines the form of our current rules, and some of the characteristics of each. It concludes with an assessment of our present legislative scheme.

THE CONSTITUTION

A) FEDERAL-PROVINCIAL SPLIT IN JURISDICTION

As a result of the Canadian constitution, corrections in Canada is organized and maintained at both federal and provincial levels. Both the federal and provincial governments have legislation governing correctional matters under their jurisdiction. The *Constitution Act, 1867* establishes jurisdiction over place of incarceration, with the provinces allocated jurisdiction over prisons and reformatories and the federal government having jurisdiction over penitentiaries. These terms are not defined and carry little more inherent meaning than places of secure custody operated by provincial governments (prisons and reformatories) and by the federal government (penitentiaries). How these institutions should differ is established primarily in practice. The dividing line between prisons and penitentiaries is contained not in the constitution, but rather in a federal statute. Section 659 of the *Criminal Code* provides that offenders sentenced to two years or more are to be sentenced to imprisonment in a penitentiary.

Although the provinces have jurisdiction over provincial prisons and reformatories, the federal government - through the *Prisons and Reformatories Act* - provides the basic legal framework governing offenders serving sentences for violating federal statutes. Release issues have traditionally been viewed as an exercise of the criminal law power, and therefore have been considered principally a matter of federal responsibility from a constitutional standpoint.[2] Federal jurisdiction is exercised primarily through the *Penitentiary Act* and the *Parole Act*, to be discussed in further detail throughout this paper.

B) THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Canadian Charter of Rights and Freedoms*[3] has special significance in any discussion of a legal framework. As a constitutional document, the *Charter* binds both the federal and provincial governments by guaranteeing fundamental rights. To accomplish this, the *Charter* imposes limits on state power which interferes with these rights.

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[2] *Constitution Act, 1867*, s.91(27). It is worth noting the suggestion of constitutional experts such as Peter Hogg that jurisdiction over release should go with jurisdiction over corrections, i.e. as a matter of *where* the sentence is served. See, in this regard, *McKend v. The Queen* (1977) 35 C.C.C.(2d) 286 (Fed Ct.).

[3] The Canadian *Charter of Rights and Freedoms* has become part of the constitution of Canada by virtue of the enactment of the *Canada Act, 1982*. This *Act* includes as a schedule the *Constitution Act, 1982*, Part 1 of which (ss.1-34) consists of the *Charter*.

With the advent of the *Charter*, the courts have been given expanded power to decide on the constitutionality of legislation as well as the actions of state officials that may affect *Charter* rights and freedoms. These include fundamental freedoms such as freedom of religion, expression and association; democratic rights, such as the right to vote; legal rights such as the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; and equality rights which guarantee to everyone equality before and under the law and the equal protection and benefit of the law. All *Charter* rights are guaranteed subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1).

The most significant aspect of the *Charter* for our purposes is the fact that its protections apply to inmates and parolees. Thus, correctional legislation and practices are subject to the *Charter*. The impact of the *Charter* on offender rights and the correctional system will be examined in the discussion of entrenchment, enforcement and limitation of *Charter* rights, in Part II. The response of the courts in applying the *Charter* to corrections will be discussed as part of the examination of judicial decisions, which follows.

JUDICIAL ATTITUDES AND DECISIONS

Case law relating to corrections has generally been dependent upon the attitude of the courts to the prospect of going behind prison walls to scrutinize correctional practices and to review the internal decision-making procedures of prison officials.

Until relatively recently, Canadian courts exhibited a marked reluctance to assume an active role in reviewing the activities and decisions of prison administrators. This judicial reticence, known as the "hands-off" approach, had the effect of immunizing prisons and the actions of prison officials from public scrutiny.[4]

One justification for the courts' approach was the belief that, having regard to the difficulties inherent in running a prison and safe-guarding prison security, the job should be left to those best equipped to handle the situation - the prison administrators themselves.[5] A second reason for the "hands-off" approach was the suggestion that confrontations between inmates and prison administrators would escalate, and would in fact be fuelled by the courts' open reception to suits brought to challenge conditions in Canadian prisons. Furthermore, the enormity of the task of rectifying conditions was regarded as a cogent factor militating against judicial interference. In this regard, the *Parliamentary Sub-Committee on the Penitentiary In Canada*[6] stated:

> The gross irregularities, lack of standards and arbitrariness that exist in our penitentiaries, by their very quantity, make and always have made, the possibility of judicial intervention into prison matters a rather impracticable, time consuming and dismaying

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[4] For an in-depth analysis see Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (University of Toronto Press, Toronto, 1983), p.82 *et seg.*

[5] F. O'Connor and L. Wright, "Mirror, Mirror on the Prison Wall!" (1984) 26 *Crim. L.Q.* 318.

[6] MacGuigan, M. (Chair). 1977. *Report to Parliament, Sub-Committee on the Penitentiary System in Canada.*

> prospect ...
>
> The sheer immensity of the task of straightening it out is enough to discourage even the most committed members of the judiciary.[7]

One of the strongest reasons offered in explanation of the courts' "hands-off" attitude was the once-popular notion that, once convicted and sentenced to a term of incarceration, a prisoner became automatically stripped of all rights.[8]

Although the concept of civil death, whereby a person lost all rights upon conviction, was abolished in Canada in 1892, the traditional view of courts, that review of prison administration was something beyond their jurisdiction, lingered.

Further factors involved two vitally important administrative law principles: first, that the only decisions which could be characterized as judicial or quasi-judicial were those which affected a person's rights; and second, that only decisions which could be characterized as judicial or quasi-judicial were subject to judicial review. Since prisoners were regarded as having few "rights", most of the decisions made by prison officials were regarded as being purely administrative in nature and were therefore immune from review by the courts. As a consequence, "inmates who had few rights, also had few remedies and were left essentially defenceless against the wide-ranging administrative decision-making power of the prison authorities."[9]

Only as recently as the 1970's did changes begin to take place. A series of decisions which relied, essentially, on the argument that an individual in prison does not lose "the right to have rights" served to strengthen the position of those in favour of offender rights."[10] In *R v. Solosky*[11] the Supreme Court of Canada expressly endorsed the proposition that a person confined to prison retains all civil rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognized that the courts have a balancing role to play to ensure that any interference with inmates' rights by institutional authorities is for a valid correctional goal and must be the least restrictive means available.

In other cases, the Federal Court applied the cruel and unusual punishment clause of the *Canadian Bill of Rights* to administrative segregation[12], and the courts began to develop the common law duty to act fairly in decisions affecting both inmates and parolees.

It is not entirely clear why the courts gradually began to assume a more active role in reviewing prison officials' decision-making procedures and to intervene to recognize and protect offender rights. It has been suggested from a sociological perspective that the increased awareness of inmates' rights paralleled a growing movement, which was particularly strong in the United States, for the extension of legal rights to a broad spectrum of groups in society such as racial minorities, children, women and the handicapped.[13] It came to be recognized that prisons operated as autonomous systems insulated from public scrutiny and external review and that this lack of public visibility made it impossible for prisoners to assert their claims on their own behalf.[14] Strong and persistent activist groups were formed to challenge the status quo.[15] Reminiscent of John Howard's model of outside inspection,[16] public scrutiny and judicial intervention came to be regarded as effective ways of controlling abuses of power behind prison walls.

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[7] *Ibid*, p.86, para. 416.

[8] *Ruffin v. Commonwealth*, 62 Va. 790 (1871), cited in Jackson, *supra*, note 4, at p.82.

[9] Jackson, *supra*, note 4, at p.82.

[10] One of the earliest cases was *R. v. Miller and Cockriell* (1975), 24 C.C.C.(2d)401(B.C.C.A.), citing with approval the American approach in *Furman v. Georgia*, 92 S.Ct. 2726 (1972).

[11] *R. v. Solosky* (1980), 50 C.C.C. (2d) 495 (S.C.C.).

[12] *McCann v. The Queen* (1976), 29 C.C.C.(2d) 377. This case forms the centre-piece of Michael Jackson's study of solitary confinement in Canada, *supra*, note 4.

It has also been suggested that the gradual acceptance of the rehabilitative ideal within corrections as a primary goal of correctional institutions was one of the most important factors which set the stage for the growth of judicial scrutiny of penitentiary operations.[17] Despite the drawbacks of the rehabilitative model, it was reasoned that since most inmates are expected to be eventually released into society, they should learn to respect authority and to participate in the democratic control of that authority by being able to challenge what may appear to be unfair or arbitrary exercises of power by prison officials.

Apart from these explanations, the shift in judicial attitudes may be looked upon as a practical consequence of the significant and radical developments which occurred in the sphere of administrative law generally. The recognition in England of a duty of procedural fairness in administrative matters opened the door to permit judicial review of decisions which could not be properly characterized as either judicial or quasi-judicial.[18]

The notion was transported to Canada and first appeared in a dissenting judgement of Dickson J. in *Howarth v. National Parole Board.*[19] In that case, Dickson J. stated, *inter alia,* that an administrative decision must be made "judicially" where the decision has a serious impact on the person involved.

> It is not necessary that a body should be a court of law... before it falls under a duty to act judicially.
>
> Generally speaking if 'rights' are affected by the order or decision ... the function will be classified as judicial or quasi-judicial and this is particularly so when the exercise of administrative power seriously encroaches on property rights or the enjoyment of personal liberty.[20]

However, before the duty to act fairly[21] could be extended to federal boards and tribunals involved in the administration of Canadian penitentiaries, a major stumbling block had to be overcome - namely, a determination of the proper forum for seeking judicial review of the decisions of these bodies. *The Federal Court Act*,[22] it was found, provided little guidance. Section 18 of that *Act* confers jurisdiction upon the Trial Division of the Federal Court to review certain decisions of a federal hoard. Section 28, on the other hand, provides that:

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[13] See James Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977).

[14] Ron Price "Bringing the Rule of Law to Corrections" in G. Zellick (ed.) *Prisoners' Rights* (Toronto: University of Toronto Press, 1978).

[15] Tamy Landau, "Due Process, Legalism and Inmates' Rights: A Cautionary Note" (1984), 6 *Can. Crim. Forum* 151, at p.153.

[16] John Howard, *The State of the Prisons in England and Wales* (first published in 1777).

[17] Landau, *supra*, note 15. See also D. Fogel, "The Justice Model for Corrections" in J. Freeman (ed.) *Prisons Past and Future* (London: Heinemann Books, 1978) and J. Jacobs, "The Prisoners Rights Movement and Its' Impacts, 1960-80" (1980), 2 *Crime and Justice* 429.

[18] *Ridge v. Baldwin*, (1964) A.C. 40 (H.L.) and *Bates v. Lord Hailsham of St. Marylebone*, (1972) 1 W.L.R. 1373.

[19] (1976) 1 S.C.R. 453.

[20] *Ibid.*, at pp. 458, 468.

[21] First officially recognized in Canada in *Re Nicholson and Haldiman-Norfolk Regional Board of Commissioners of Police* (1978), 88 D.L.R. (3d) 671 (S.C.C.).

> 28(1) Notwithstanding s.18 or the provisions of any other *Act*, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal ...

The confusing issue of the appropriate forum was resolved in the case of *Martineau*, an inmate at Matsqui Institution, who sought judicial review of a decision of a prison disciplinary board which convicted him after hearing certain evidence in the inmate's absence.

It was the landmark decision of *Martineau (No. 2)*[23] that ultimately resolved the dilemma by ruling that decisions of federal boards and tribunals not required by law to be made on a judicial or quasi-judicial basis are subject to review by way of prerogative writs by the Trial Division of the Federal Court. In imposing a general duty of fairness, falling short of the full rules of natural justice, on decision-making in the administrative sphere, the Supreme Court of Canada imposed the rule of law within prison walls.

> [T]he application of a duty of fairness with procedural content does not depend upon proof of a judicial or quasi-judicial function. Even though the function is analytically administrative, Courts may intervene in a suitable case.
>
> In the case at bar, the Disciplinary Board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision has the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.[24]

The significance of the *Martineau (No.2)* decision is far-reaching. Basically, it operated to open administrative decisions of federal bodies to judicial review. The characterization of a decision as judicial, quasi-judicial or administrative became a determinant not of whether procedural safeguards applied and whether relief was available, but of the extent to which procedural protections applied and what the proper forum for seeking a remedy would be. As a result, it may be concluded that the concept of fairness is a fluid one; the requirements of the duty to act fairly will vary depending on the circumstances of a particular case. As one author has explained:

> The decision...introduced a spectrum approach...from the full panoply of

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[22] R.S.C. 1970, 2nd Supp. c.10.

[23] *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, (1979) 106 D.L.R. (3d) 385 (S.C.C.).

[24] *Ibid.*, p.405, per Dickson, J.

> protection downward... The challenge introduced by *Martineau (No. 2)* is to determine where in that spectrum a given decision lies.[25]

It is evident from this whole discussion that Canadian courts, responding to the various factors described above, were beginning to show a marked shift from the "hands-off" to the "hands-on" approach in dealing with inmate rights even prior to the *Charter*.

It is not yet entirely clear from the case law what effect judicial interpretation of the *Charter* will have on corrections. Although any conclusions are still largely speculative at this stage, there have been some interesting developments.[26]

In many corrections cases at the lower court level the relationship between section 7 and the duty to act fairly has been the subject of extensive, though conflicting, judicial comment. Section 7 guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In *Re Cadeddu and the Queen*,[27] for example, Potts J. held that the requirements of section 7 are more onerous than the common law duty of fairness. In that case, the applicant was not entitled to a hearing before his parole was revoked, under the rules of fairness, since the relevant legislation implicitly disentitled him to a hearing in the circumstances. However, since the rights guaranteed under section 7 prevail over legislation, Potts J. went on to hold that in order to comply with the *Charter* requirements of fundamental justice, an in-person hearing was called for.

> "Considering that the rights protected by s.7 are the most important of all those enumerated in the *Charter*, that deprivation of those rights has the most severe consequences upon an individual, and that the *Charter* establishes a constitutionally mandated enclave for the protection of rights, into which government intrudes at its peril, I am of the view that the applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked ...
>
> Although nothing in the common law or in federal or provincial legislation required the board to grant a hearing - or, for that matter, forbade the board to do so - I am of the opinion that the *Charter* dictates that such an opportunity be given."[28]

In sum, the *Cadeddu* decision supports the proposition that the principles of fundamental justice may afford a remedy under section 7 in cases where the operation of the common law duty to act fairly would not have afforded a remedy.

Similarly, in *Re Swan and the Queen*[29] a case dealing with a post-revocation hearing in regard to parole, McEachern C.J.S.C. suggested that the rules of fundamental justice require more than fairness. Noting that section 7 of the *Charter* had not, at that time, been analyzed by an appellate

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[25] O'Connor and Wright, *supra*, note 5, at pp. 322-23.

[26] See A. Wayne MacKay, "Fairness After the *Charter*", (1985) 10 *Queen's L.J.* 263; Fergus O'Connor, "The Impact of the *Canadian Charter of Rights and Freedoms* on Parole in Canada", (1985) 10 *Queen's L.J.* 336, Allan Manson, "Administrative Law Developments in the Prison and Parole Contexts" (1984), 5 *Admin. L.R.* 150, and "The Duty to Act Fairly" prepared for the National Parole Board, 1984.

[27] (1982), 4 C.C.C. (2d) 97 (Ont. H.C.J.).

[28] *Ibid.*, at p. 109.

[29] (1983), 7 C.C.C. (3d) 130 (B.C.S.C.).

Court, McEachern C.J.S.C. stated that section 7 appears "...to tilt the scales strongly towards the requirements of natural justice rather than just procedural fairness."[30] Several other judicial statements support natural justice as the standard under section 7.[31]

On the other hand, however, a number of courts have propounded the contrary view that section 7 does not demand a higher standard of conduct with respect to administrative bodies than does the common law duty of fairness.[32]

The decision of the Supreme Court of Canada in an immigration case, *Singh et al v. Minister of Employment and Immigration et al.*,[33] which was the first decision at this level to deal with the meaning and application of section 7, has shed some light on this area. While the Court did not seize the opportunity to clarify exactly what the principles of fundamental justice require, the decision does seem to support the view that the requirements of section 7 of the *Charter* exceed those imposed by the common law fairness doctrine. The Court adopted the position that the principles of fundamental justice include, at a minimum, procedural fairness and stated that procedural fairness demands different things in different contexts. The significance of the *Singh* decision is the implication that section 7 may impose a higher standard than that required by the duty to act fairly.

In another recent case, the Supreme Court provided further direction. *Reference re Section 94(2) of the Motor Vehicle Act*[34] dealt with the scope of the words "principles of fundamental justice". Undertaking a purposive analysis designed to ascertain the purpose of the section 7 guarantee and the interests it was meant to protect, Lamer, J., did not clarify what the principles of fundamental justice require, but came to the following conclusions:

> The term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

He objected to an interpretation simply equating "fundamental justice" with "natural justice", and went on to say that the principles of fundamental justice are not limited to procedural guarantees, nor can they be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s.7. Although this case does not involve corrections directly, it paves the way for a broad approach by the Courts in future cases concerning "fairness" and offenders.

The role of the courts in requiring that certain restrictions be placed on the penitentiaries' ultimate carceral power was reflected in the simultaneous treatment of three cases by the Supreme Court of Canada in December, 1985: *Morin v. National Special Handling Unit Review Committee et al*; *R v. Miller*; and *Cardinal et al v. Director of Kent Institution.*[35] The Court dealt with largely procedural questions relating to inmates' access to the *habeas corpus* remedy in a manner which reaffirms recognition of inmate rights, in this case of rights to "residual liberty" in regard to placing inmates in administrative segregation and special handling units. Characterizing such practices as "creating a prison within a prison", the Court held that even though inmates have a limited right to liberty, they must be treated fairly in regard to any limitations on the liberty they retain as members of the general prison population.

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[30] *Ibid.*, at p. 141.

[31] See, *e.g.*, *R. v. Sibley* (1982), 4 C.R.R. 166 (N.S. Co. Ct.) at p.168; *Re Jamieson and The Queen* (1982), 70 C.C.C. (2d) 430 (Que. S.C.) at p.438; *R. v. Holman* (1982), 28 C.R. (3d) 378 (B.C.S.C.), at p.389

[32] See, *e.g.*, *Re Chester* (1984), 40 C.R. (3d) 146 (Ont. H.C.J.) where Holland J. stated at p.177: "[T]he protection given to a person ... is the right to procedural fairness whether it be considered under the common law, the Bill of Rights or the *Charter*. Each affords the same measure".

[33] (1985), 58 N.R.1 (S.C.C.).

[34] Judgement rendered December 17, 1985 (not yet reported).

[35] Judgements rendered December 19, 1985 (not yet reported).

Emerging from this examination of the impact of the courts on corrections is the fact that the courts now seem willing to scrutinize the administration and practices of penitentiaries. Even prior to the *Charter*, the courts played an important role in recognizing and legitimizing the rights of inmates. At this stage, it appears that the power of the courts has been strengthened under the *Charter* and that their efforts to provide procedural protections and substantive content to the rights of offenders continue.

INTERNATIONAL LAW

Canada has entered into a variety of obligations under international law to maintain standards with respect to the criminal justice system.

Foremost amongst these are Canada's obligations under United Nations treaties. Not only is Canada subject to the provisions of the *UN Charter* and the *Universal Declaration of Human Rights*, it is also signatory to the *International Covenant on Civil and Political Rights* and its *Optional Protocol*, and the *International Covenant on Economic, Social and Cultural Rights*.

Specific provisions of the Civil and Political Rights *Covenant* relate to prisoners and penitentiaries. All persons deprived of their liberty are to be treated with humanity and with respect for the inherent dignity of the human person. The individual's right to be protected against torture, or cruel, inhuman or degrading treatment or punishment is upheld. It is also stipulated that the penitentiary system shall provide for treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. Other provisions state that no one shall be subjected to arbitrary or unlawful interference with their privacy.

In addition to being party to these treaties, Canada has also endorsed the *United Nations Standard Minimum Rules for the Treatment of Offenders*. The obligations that are imposed as a result of international law on Canada, where treaties are not self-executing, will be considered in the next chapter, which deals with "factors shaping the form and content of legislation".

LEGISLATION

Currently there are several federal statutes dealing with the field of corrections - the *Penitentiary Act*, the *Parole Act*, the *Prisons and Reformatories Act*, the *Transfer of Offenders Act* and the *Criminal Code*. The following is a brief description of these pieces of legislation.

The *Penitentiary Act* deals with a variety of matters, many of an organizational nature such as the establishment of the correctional service, the agency head, national and regional headquarters. Other matters in the *Penitentiary Act* include federal/provincial transfer agreements (s.15), the right to earn remission (s.24), and powers of correctional officers (s.10). Subordinate legislation, in the form of regulations, is authorized under s.29 of the *Act*:

> 29(2) The Governor in Council may make regulations
>
> a) for the organization, training, discipline, efficiency, administration and good government of the Service;
>
> b) for the custody, treatment, training, employment and discipline of inmates;
>
> b. 1) prescribing the compensation that may be paid pursuant to section 28.1 and the manner of its payment;
>
> b. 2) defining the term "spouse" and the expression "dependent child" for the purpose of section 28.1;
>
> b. 3) for the collection, administration and distribution of estates of deceased inmates; and
>
> c) generally, for carrying into effect the purpose and provisions of this *Act*.
>
> 29(2) The Governor in Council may, in any regulations made under subsection (1) other than paragraph (b) thereof, provide for a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months, or both, to be imposed upon summary conviction for the violation of any such regulation.

The *Penitentiary Service Regulations* enacted under section 29 deal with a number of organizational matters such as the duties of institutional heads (s.5), and authority to delegate routine matters. The right of inmates to adequate food and clothing (s.15) and the provision of essential medical and dental care (s.16) are found in the *Regulations*. The creation of inmate offences and penalties, and the disciplinary process are in *Regulations*. Section 3 of the *Regulations* outlines the duty of every member of the Service to use his best endeavours to achieve the purpose and objectives of the Service, namely "the custody, control, correctional training and rehabilitation of persons who are sentenced or committed in penitentiary." This is the only statement of mandate of corrections and it is remarkable that, vague as it is, it appears in a regulation instead of a statute.

Similarly the *Parole Act* provides for the organizational structure of the National Parole Board (including number of members, provision for regional panels, agency head), powers of the Board (s.6), and the duty to review every penitentiary inmate for parole (s.8), authorizes the establishment of provincial parole boards, and provides for mandatory supervision (s.15). Section 9 authorizes the making of regulations by Governor in Council. This section is very specific, and outlines the exact subject matter which Cabinet may prescribe (for example, prescribing the minimum number of members to vote on a case). The *Parole Regulations* contain very detailed rules on a wide range of topics. The *Regulations*, rather than the statute, contain rules concerning eligibility for parole, including the time an inmate must spend in custody before being eligible. As well, they provide for the right to assistance at hearings (s.20.1), the right to information upon which the Board will base its decisions (s.17), and the right to reasons for parole decision, (s.19). This detailed regulation-making power is in sharp contrast to the extremely broad power in s.29 of the *Penitentiary Act*.

The *Prisons & Reformatories Act* governs certain aspects of incarceration in provincial institutions of persons serving sentences for offences against federal statutes. It covers such areas as the granting of remission, temporary absences, and authority for transfers of inmates between provinces.

The *Act* has undergone extensive revisions in recent years. The trend has been to remove unnecessary detail to permit provincial governments greater control over correctional operations. At the same time, consistency in certain key areas, such as the granting of remission, is maintained.

The *Transfer of Offenders Act* establishes the eligibility of Canadian offenders imprisoned in a foreign state with which Canada has a treaty to be transferred to Canada to serve the remainder of their sentence in a Canadian prison or penitentiary. There is also provision for the transfer to Canada of Canadian offenders on parole or probation in a foreign state.

Foreign nationals incarcerated in Canada may be transferred to their homeland if the conditions in the *Act* are met, and if they are from a country with which Canada has a treaty for the transfer of offenders. *Regulations* under this *Act* may be made by the Governor in Council to prescribe the form and manner of application for transfer, and for factors which the Minister shall take into consideration in making a decision.

Criminal Code provisions which directly affect corrections include s.659 (sentences of two years or more to be served in penitentiary), s.660 (sentence to be served according to rules governing the institution), s.674 (prohibiting parole consideration for cases of life imprisonment until expiration of specified number of years of imprisonment), and s.695.1 (review of dangerous offenders for parole). Section 2(b) of the *Code* specifies that a "peace officer" includes "a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison" (prison is defined as including a penitentiary). Thus any consideration of the powers and responsibilities of correctional staff will involve an analysis of the many other provisions relating to peace officers found in the *Criminal Code*.

COMMISSIONER'S DIRECTIVES (AND OTHER ADMINISTRATIVE DIRECTIVES)

As noted above, under s.29 of the *Penitentiary Act*, the Governor in Council is given wide power to make regulations. As well, s.29 (3) states:

> Subject to this *Act* and any regulations made under subsection (1), the Commissioner may make rules, to be known as Commissioner's directives, for the organization and good government of the Service, and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries.

In addition, the *Penitentiary Service Regulations* authorize the making of the following rules: s.7, Divisional Staff Instructions, to set out the procedures by which policy is to be given effect; s.8, Standing Orders; and s.9, Routine Orders. The former are issued from National Headquarters, while the latter two may be issued by an institutional head. The exact legal nature of the Commissioner's Directives was explored by the Supreme Court of Canada in the case of *Martineau (No. 1)*,[36] which held that they do not have the force of law. After affirming that the *Penitentiary Service Regulations* were law, Pigeon, J., went on to say,

> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and while they are authorized by statute, they are clearly of an administrative, not a legislative nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. It appears to me that s.29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided by statute.
>
> In my opinion it is important to distinguish between duties imposed on public employees by statutes or regulations having force of law and obligations prescribed by virtue of their condition of public employees. The members of a disciplinary board are not high public officers but ordinarily civil servants. The Commissioner's directives are no more than directives as to the manner of carrying out their duties in the administration of the institution where they are employed.[37]

An important issue that arises with respect to these directives is the remedy available for their breach. At present, under the authority of the *Martineau (No. 1)* decision, there is no legal or judicial remedy, as the directives are not law. The offender therefore must seek a non-legal remedy through the internal grievance procedure which provides the primary internal means of redress for the broad range of complaints that arise out of institutional life. Complaints are common in regard to correspondence, visits, staff performance, inmate pay and contraband. There is also an internal mechanism available to enable the processing of claims against the Crown for loss of property or to compensate for injury. The Correctional Investigator, an ombudsman-like official for federal penitentiaries, plays a critical role in investigating complaints that have not found adequate internal redress. The Canadian Human Rights Commission, the Commissioner of Official Languages, and the Information and Privacy

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[36] *Martineau v. Matsqui Inmate Disciplinary Board (No.1)* (1977), 33 C.C.C. (2d) 366 (S.C.C.).

[37] *Ibid.*, p. 374.

Commissioners, as well as the officials with whom inmates are entitled to correspond in confidence, such as the Solicitor-General, and members of Parliament, all may supply some redress by investigating issues and advising on matters within their mandates.

STANDARDS

Another form of non-legally binding rules is found in sets of standards developed by groups such as the American Correctional Association and the Canadian Criminal Justice Association. The approach taken is to describe the level of service to be provided by the correctional system and procedures to be followed to meet the objectives. Flexibility for variation among correctional authorities in setting the actual levels of service is allowed, as long as these are specified in the written policy and procedures. Compliance with the standards is verified by an accreditation team, a body independent from the organization being accredited.

As well, there exist many internal sets of standards in one form or another. For example, the CSC Policy and Procedure Manual, the NPB Policy and Procedure Manual, Offender Programs Case Management Manual and the British Columbia Manual of Standards, are management tools designed to ensure a consistent level of service throughout a system.

PROBLEMS WITH THE EXISTING LEGISLATIVE SCHEME

The foregoing discussion surveyed the rules, emanating from a variety of sources, which govern corrections. For the purposes of the Correctional Law Review, the most important of these is correctional legislation (which includes regulations). An assessment of the major problems and concerns relating to the existing legislative base for corrections is a necessary step in developing proposals for change. Many such problems were originally set out in a paper entitled "Proposal on Developing a New 'Corrections Act'", prepared by CSC in 1980, and bear repeating here.

Specific sections or provisions of the *Acts* and *Regulations* have been identified as obsolete, imprecise, or operationally difficult.[38] Many of these could be simply remedied by specific amendments to delete, clarify, or adjust, etc. More important, however, are a number of general deficiencies that underlie and go beyond many of the specific problems. A thorough, coordinated and comprehensive revision of the *Penitentiary Act* and other pieces of legislation is necessary to deal with these problems:

A) *AD HOC* DEVELOPMENT

The present *Penitentiary Act* represents the accumulation of incremental changes to a piece of legislation whose basic form and content were first adopted in 1868. Since that time the *Act* has evolved by way of a continuing process of *ad hoc* amendments and several major revisions, the last being in 1977.

This essentially incrementalist approach has failed to deal with changes that would be desirable and beneficial but which were not perceived as immediately necessary. Furthermore this approach has failed to deal with generic problems and weaknesses that are reflected pervasively throughout the *Act* and/or related legislation, and which require generalized revision of the structure and content of relevant legislation. The total effect of these features is to leave the impression that the *Act* is outdated, confusing, and often inadequately related to current realities.[39] More specific instances of these problems are set out in the following discussion.

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[38] These are set out in the Appendix to "Proposal on Developing a New Corrections Act", prepared by CSC in 1980.

B) PHILOSOPHY

Many of the problems associated with the present *Penitentiary Act* stem from the fact that it contains no statement of principles or philosophy to guide its interpretation and application. Nor is it likely or apparent that a consistent philosophy has been implicitly incorporated in the legislation over its lengthy evolution. It is even less clear that any common set of principles apply to the various pieces of legislation pertaining to corrections, to guide and coordinate their combined effect. This is true of most Canadian legislation. However recent criminal justice statutes such as the *Young Offenders Act*, and the *Access tolinformation and Privacy Acts*, have included such statements.

C) RELEVANCE TO RECENT DEVELOPMENTS

Growth, change and innovation in federal corrections since the enactment of the *Parole Act* (1958) have been massive. The size, organization and activities of federal correctional services are far different and more complex than they were less than 20 years ago. There is a need for legislation to reflect the broader range of correctional functions and services that today exist, to define the more complex set of interrelated responsibilities, authorities and relationships that have developed, and to regulate many aspects of this more sophisticated reality than was envisaged by earlier legislation.

The two major pieces of legislation that presently govern the NPB and CSC (the *Parole Act* and *Penitentiary Act*) reflect the interdependency of the agencies themselves. Each *Act* contains provisions that are binding on both organizations and in a number of instances one *Act* depends on the other for definition of terms and statements of authority. For example, the powers and duties of the Parole Board with regard to unescorted temporary absences are outlined in sections 26(l) and 26(2) of the *Penitentiary Act* (although this will be changed if Bill C-68, presently before the House, becomes law). In all cases where individuals return to custody upon parole or mandatory supervision revocation, in addition to new sentences regard must be had to both the *Penitentiary Act* and the *Parole Act* in order to determine the length of time that must be served.

The interrelationship between these two pieces of legislation has apparently grown largely out of necessity as the roles and responsibilities of the two organizations have changed and especially with the moving of what was the National Parole Service from NPB to CSC. However neither *Act* has been comprehensively revised to reflect the changing roles of either organization nor the altered relationship between them. At the core of each *Act* remains the now-outdated assumption that its purpose is to give direction and authority to a single organizational entity. Consequently these two *Acts*, whether considered separately or in combination, fail to set out the distinct roles and jurisdiction of each agency and the intricate relationship between them.

Federal and provincial operations in the field of corrections have become increasingly interdependent in recent years without the development of a corresponding framework of legislation.

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[39] The confusion generated by this piece-meal approach to correctional legislation has not gone unnoticed by the courts. See, for example, *Re Dean and the Queen*, (1977), 34 C.C.C. (2d) 217, at 218.

At the present time provisions are contained in the *Penitentiary Act*, the *Parole Act*, and *Prisons and Reformatories Act* which have an impact on the other jurisdiction or which must be read together to gain a full understanding.[40] In other cases the law is simply silent on activities that could be seen as intrusions into the other jurisdiction's area of authority.[41]

Considering the interdependence of the two systems in certain respects, federal-provincial interactions would be facilitated by greater precision in defining respective areas of jurisdiction and providing enabling and regulating authority for activities that intrude into or overlap with the other jurisdiction.

The preceding discussion has addressed mainly operational and organizational requirements that would be facilitated through a comprehensively revised legislative scheme. It points out the need for legislation to keep pace with developments. Even more important in this regard is the need to take into account any developments in the law or the wider justice system which have an impact on corrections. The most significant of these is, of course, the *Charter*.

Correctional legislation has not as yet been comprehensively revised or restructured since the enactment of the *Charter* or to keep pace with developments in administrative law, such as the common law duty of fairness. Even though Commissioner's Directives and Standing Orders have been reviewed and to some extent revised in light of the *Charter*, the impact of the *Charter* goes much deeper and may require fundamental restructuring of the legislative scheme and a reorientation of its substance to be consistent with *Charter* demands. In other areas, where there may not be a *Charter* right affected, there is nonetheless a need for clearly articulated legal rules to set out the scope of the right or privilege involved. These matters will be discussed further in the following section.

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[40] For example, Exchange of Service Agreements are authorized in part by s.15 of the *Penitentiary Act* and by s.4 of the *Prisons and Reformatories Act*, both of which must be read to determine the authority for the Agreement.

[41] For example, health care and education.

PART II: FACTORS SHAPING THE FORM AND CONTENT OF LEGISLATION

This part of the paper examines the constitutional and other aspects of our system that play a major role in shaping the form and content of a legislative scheme to govern corrections. There are two aspects of Canadian constitutional law that bear upon both the form and content of correctional legislation: 1) the *Canadian Charter of Rights and Freedoms*, and 2) the constitutional split in jurisdiction between the federal and provincial governments. Also having an impact are the obligations that Canada has assumed under international law in regard to corrections. These aspects were all discussed in the previous section in regard to the present framework of rules governing corrections, and shortcomings in the present legislative scheme were pointed out. In this section, we will consider the impact of these factors in developing a new legislative scheme. In addition, the development of a statement of philosophy for the correctional system will be discussed.

THE CHARTER

As a constitutional document, the *Charter* has an impact on both the form and content of legislation. In order to appreciate the degree of protection given to rights by their inclusion in the *Charter of Rights and Freedoms*, it is necessary to consider entrenchment, enforcement and limitation of *Charter* rights.

The *Charter* 'entrenches' rights; it cannot be amended by the ordinary legislative process, but only by the process of constitutional amendment.

The *Charter* takes precedence over all existing as well as future laws. Sub-section 52(l) of the *Constitution Act 1982* states that "the Constitution of Canada [which includes the *Charter*] is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This gives a court the power to disregard any statute which it finds to be inconsistent with the *Charter*. No special authority is needed for this mode of enforcement; it follows from the fact that the inconsistent law is of no force or effect.

The *Charter* does more than permit courts to limit or declare inoperative legislation that infringes or denies *Charter* rights. Equally important is the provision creating a remedy for breach of the *Charter* by actions of individual state officials such as correctional staff. Sub-section 24(l) authorizes "anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied" to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstance". This implies that anyone who establishes that his rights or freedoms have been infringed or denied has by that fact alone made out a cause of action entitling him to an "appropriate and just remedy".

The *Charter* contains some significant limitations through the override clause of section 33 and the limitation clause of section 1. The section 33 override clause expressly permits the federal Parliament or a provincial Legislature to exempt a statute from compliance with certain provisions of the *Charter*. It is anticipated that due to political considerations the override clause will rarely be used.

Section 1 of the *Charter* enables Parliament or a Legislature to enact a law which has the effect of limiting one of the guaranteed rights or freedoms. However, the government must prove that any limitation is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

The Supreme Court of Canada, in a major case arising under the *Narcotic Control Act*, has established a strict test to be met before *Charter* rights may be limited.[42] It sets out two central criteria which must be satisfied to establish that a limit is reasonable and justified under section 1. First, the objective to be served by any measure limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Second, the party invoking section 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test which involves 3 components: 1) the measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it, 2) the means should impair the right in question as little as possible, and 3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be. The test in section 1 is extremely important in corrections, where it may be necessary to argue that even though as a general rule inmates retain rights, a certain constitutional right must be limited under section 1. It is in applying the section 1 test that such serious factors as security and good order of the institution will be balanced against the guarantee of *Charter* rights.

The section 1 limitation clause has a major impact on not only the substance, but the form of a legislative scheme as well. Under the existing scheme, various constitutional rights are limited by Commissioner's Directives, which would not be, according to recent interpretations of the *Charter*, "prescribed by law".[43] To accord with section 1, any limitations on *Charter* rights must not only be justifiable by the government but must be contained in statute or regulation, and not in directives. In any event, there are strong policy reasons to limit *Charter* rights only through the democratic process of law-making rather than in policy directives.

We emphasize again that one of the main tasks of the Correctional Law Review is to ensure that all correctional legislation and practice conforms with the *Charter*. Because the *Charter* is drafted in general, abstract terms, legislation plays a crucial role in articulating and clarifying *Charter* rights in the correctional context. Questions concerning procedural fairness, conditions of confinement and criteria for decision-making will all be affected by the *Charter*. For a host of reasons which will be discussed further in relation to codification, Parliament is in a better position to deal with these questions in the context of a fundamental review of correctional law than are the courts, which operate on a case-by-case basis.

FEDERAL-PROVINCIAL SPLIT IN JURISDICTION

Another aspect of constitutional law which has a major impact on corrections is the present jurisdictional split between the federal and provincial governments.

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[42] *R. v. Oakes*, judgement rendered Feb. 28, 1986 (not yet reported), p. 35-45.

[43] Discussed, *infra*, p. 52.

The Correctional Law Review Working Group is mindful that the constitutional split in responsibility limits the scope of federal legislative power and necessitates close cooperation between the federal and provincial governments in any discussions on matters which may have an impact on both the federal and provincial systems. We recognize that even changes in federal legislation which purport to be restricted to penitentiaries may nonetheless have an impact on provincial jurisdictions by virtue of s.15 of the *Charter* or simply through public pressure to make similar changes.

INTERNATIONAL LAW OBLIGATIONS

In addition to the constitutional factors, there also exist aspects of international law which affect the form and content of the legal framework. The previous chapter outlined various substantive provisions of international treaties which Canada must comply with.

One of the most important of these treaties, the *International Covenant on Civil and Political Rights*, obliges Canada "to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present *Covenant*, without distinction of any kind" (Article 2(1)).

In Canada treaties are not self-executing; the general rule is that international law has no application unless incorporated into Canadian domestic law. The Supreme Court of Canada has maintained that there are no domestic, internal consequences of an international convention or treaty unless they arise from implementing legislation giving the convention legal effect within Canada.[44]

Despite this, it appears that in order to fulfill obligations under the *Covenant* it is not necessary to incorporate the *Covenant* directly into the constitution or laws of the ratifying state.[45] All that Article 2 of the *Covenant* requires of a State Party in this regard is the following:

> (2) Where not already provided for by existing legislative or other measures,... to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present *Covenant*, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present *Covenant*.
>
> (3) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...[and] [t]o ensure that the competent authorities shall enforce such remedies when granted.

Accordingly, even though it is not necessary that every single right and freedom set out in the *Covenant* be specified in the law or constitution, Canada is nonetheless obliged to give effect to the rights and provide effective remedies.

In addition, Canada has endorsed the *UN Standard Minimum Rules for Prisoners* (SMR). They are in the form of recommendations and therefore are not binding in international law. In a recent report,[46] it was determined that CSC met the spirit, if not the letter, of all but three of the *Rules*; these were *SMR* 9(l)(single occupancy), *SMR* 11(a) (natural light requirements) and *SMR* 77(l)(compulsory education of illiterates and young offenders). Some current CSC practices exceed the requirements of the *Rules*, and some *Rules* are outdated. Nonetheless, Canada has reiterated its commitment to the *Rules*. The implementing procedures for the rules call for all States whose standards fall short to adopt them. Most notably, they call for the "embodiment" of the *Rules* in legislation and regulation. Questions arise as to whether this requires enactment of the rules *en bloc* or whether it is sufficient if they are enacted amongst various pieces of corrections legislation. The main concern is, however, to make sure that the substance of the *Rules* are incorporated in statute or regulations.

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[44] *Rogers Cable T.V. Ltd.* (S.C.C.).

[45] Discussed in Mr. Justice W.S. Tarnopolsky, "A comparison Between the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*" (1983) 8 *Queen's Law Journal* 211, at 212.

The Correctional Law Review, in its work on inmate rights and remedies, must ensure that the form and content of correctional legislation complies with Canada's international obligations.

PHILOSOPHY OF CORRECTIONS

One of the main tasks of the Correctional Law Review is the development of legislation which reflects the philosophy of corrections in Canada. In order to do this, we must be clear about what the purpose and principles of corrections are. The starting point of this discussion will be the purposes and principles identified by the Criminal Law Review in regard to the criminal justice system that are intended to guide the review process as a whole.

A) PURPOSE AND PRINCIPLES OF THE CRIMINAL JUSTICE SYSTEM

A series of studies carried out over the past several decades have pointed to the need for a unified statement of philosophy for the Canadian criminal justice system. As stated in the *Report of the Canadian Committee on Corrections* (the Ouimet Report) in 1967,[47] correctional services must be seen as an integral part of the total system of criminal justice and their aims should be consistent with and supportive of the aims of the law enforcement agencies and the courts. The Ouimet Report stressed the need for a shared general philosophy to enable the criminal justice system to meet its demands. The Criminal Law Review has responded to the recommendations of the Ouimet Report and other studies by articulating a "comprehensive justice policy" that sets out its views of the philosophical underpinnings of criminal law policy. This is contained in *The Criminal Law in Canadian Society* (*CLICS*), issued by the Criminal Law Review. *CLICS* provides a basic framework of principles within which more specific issues, such as those of correctional law and policy, may be addressed and assessed.

According to *CLICS*, the purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

The purpose of the criminal law is to be achieved in accordance with the *Charter* and with a set of principles applicable to the criminal justice system as a whole.

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[46] Report on the Standard Minimum Rules prepared for the Seventh UN Congress in 1985.

[47] Ouimet, R. (Chair). 1969. *Report of the Canadian Committee on Corrections - Toward Unity: Criminal Justice and Corrections*. Ottawa: Information Canada, p.277.

B) PURPOSE AND PRINCIPLES OF THE CORRECTIONAL SYSTEM

Guided by the general statement in *CLICS*, a more specific statement of correctional philosophy has been developed for the Correctional Law Review. The statement was devised through the process set in motion by the Project's *First Consultation Paper*, and is the subject of an in-depth examination in the first Working Paper of the Correctional Law Review, which was devoted to the philosophy of corrections. Two basic questions which were addressed are: what is the correctional system supposed to accomplish, and, how do we, as a modern society, want to go about it.

The statement of purpose and principles for corrections arrived at in the first Working Paper is as follows:

> The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:
>
> a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material resented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;
>
> b) providing the degree of custody or control necessary to contain the risk presented by the offender;
>
> c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;
>
> d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;
>
> e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

> 1 Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.
>
> 2 The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be

imposed by the correctional authorities with regard to an individual's crime.

3 Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4 In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7 Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8 The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

It is important to remember that one of the primary goals of the Correctional Law Review is the development of legislation which reflects a consistent philosophy of corrections. This philosophy must accord with a unified statement of philosophy for the criminal justice system as a whole. It also must serve to meet the problems which have been attributed, in every recent report and study, to the lack of a consistent philosophy of corrections. The question of how best to achieve this, that is, whether legislation should contain an explicit statement of philosophy, as well as principles and objectives, will be examined in the discussion of codification.

PART III: MEETING THE GOALS OF THE CORRECTIONAL LAW REVIEW

Previous sections have examined the context in which the Correctional Law Review is being carried out, including constitutional and other factors affecting the form and content of legislation. We will now move to the next step of considering the legislative framework which will allow the Correctional Law Review to best meet its goals. In this section we shall focus on two goals and how to achieve them: first, how to develop correctional legislation that best promotes voluntary compliance with its provisions and aids in the resolution of conflicting interests; and second, how to arrive at legislation that furthers fair and effective correctional decision-making.

PROMOTING VOLUNTARY COMPLIANCE

In developing a legislative scheme that promotes compliance with its provisions we will be viewing corrections as not only a "system" as such, but also as groups of people within it and affected by it. Corrections is, after all, a human enterprise.[48] The interests of offenders, correctional staff and management, and members of the public, must all be taken into account. Only a legislative scheme that operates to protect the interests of all these people will be fair or effective. Such a scheme must not come from abstract notions of justice alone, but from a careful consideration of the rights, interests and concerns of all participants as well. We will first deal with each group separately, followed by a consideration of the areas where their interests conflict, and more importantly, the points where the various interests converge.

A) OFFENDERS

In considering the rights and interests of offenders, who for purposes of our discussion are persons undergoing sentences of incarceration, the first questions are to what extent their rights differ from the rights of other citizens and, if they do differ in what respects.

The obvious distinction is in relation to liberty; incarceration necessarily results in loss or restrictions on the offender's right to liberty. However, in all other respects the offender has a right to live as full and normal a life as is compatible with incarceration. Indeed, the offender acquires rights through loss of liberty and dependence on the state, such as the right to be provided with the basic amenities of life, including adequate food, clothing, and accommodation.

This situation derives from the fundamental precept that inmates are sent to prison *as* punishment, not *for* punishment. This precept has been accepted in almost every Western democracy and is recognized as a fundamental starting point by the Correctional Law Review. It requires a justice system within the institution that ensures that an inmate's rights will be respected. Such a system would operate to protect the inmate if he is denied his rights, as well as deal with the transgressor. As well, it would provide a rational basis for ordering the prison community according to rules which take into account inmate interests and which are known to all in advance. This system would be manifested by fair and impartial procedures that must be strictly observed, would proceed from rules that cannot he avoided at will, and would treat all who are subject to it equally. In essence, such a system would ensure that the rule of law would prevail inside the institution.

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[48] This was identified as Basic Principle No.1 in the *Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions*, November, 1984 (*Carson Committee Report*). According to the Report, "with 10,569 employees and about 12,000 inmates in custody, there are close to 23,000 human beings in daily direct involvement with the organization. Untold thousands of third parties (spouses, families, volunteers and victims) have an additional stake in the business."

This type of system was recommended by the *Parliamentary Subcommittee on the Penitentiary System in Canada* in 1977. As stated in its Report,[49] "justice for inmates is a personal right and also an essential condition of an inmate's socialization and personal reformation. Justice implies both respect for the persons and property of others and fairness in treatment."

Such a system has advantages for everyone involved. Failure to provide a just system to protect inmates' rights increases the tensions of prison life. An inmate who is sent to prison for breaking the law can only resent finding himself in a closed society ruled not by law, but by discretionary power which may be wielded arbitrarily. The ensuing tension could create an atmosphere of mistrust, which could lead to violence, and which is contrary not only to the interests of inmates, but to staff, management and the larger community as well.

Related to this is the interest that an inmate has in seeing that he does not leave prison with fewer skills or in a worse psychological state than when he entered it. In addition, he may legitimately have an interest in improving his educational and vocational skills, getting appropriate medical and psychiatric care, maintaining and improving family relationships and so on. Opportunities must be available for an inmate to meet these goals in the general interest of the rehabilitation of the individual and the benefit it would bring the community.

B) CORRECTIONAL STAFF

The rights and interests of correctional staff are key elements to be kept constantly in mind throughout the course of the Correctional Law Review. It is important to recognize two facts: that staff are as integral a part of penitentiary life as the inmates, and that no correctional system will be effective unless their rights, interests and concerns are taken into account.

The job of a correctional staff member is a difficult one, often exacerbated by a misunderstanding of their concerns on the part of inmates, management, and the public. It is important that persons with this job not be seen only as "guards" but as members of an important social service demanding ability, appropriate training, and good teamwork. This is especially important today, when many correctional staff, such as parole officers, have a dual role to play in relation to inmates. Staff are often expected to function as counsellors as well as police. Conflicts which arise as a result must be recognized and dealt with. It is important that conditions of service that will attract and retain the best qualified persons be implemented. As well, all staff should have access to continuous support and training programs.

Correctional staff perform a job which is characterized by constant fear of making a mistake which may result in an escape, or some form of violence. This situation leads to an inclination to solve inmate-staff problems through increased security measures rather than through more individualized problem-solving techniques.[50]

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[49] *Supra*, note 6, p.87.

"Security" has been described as the ultimate weapon to be used by the staff to demonstrate that they are the final masters, in physical terms. It has also been noted that correctional officers perceive the increased freedom and new programs for inmates as not only eroding their power but also as causing a deterioration in security.

There is no doubt that security is a legitimate concern of staff and the institution, and that it must be a top priority in operating an effective system. Along the same line, it is also important to recognize that proper safeguards must exist to allow a correctional official to perform his functions safely. In addition, however, there is a need for re-orientation in the training of correctional staff. Staff should be trained to solve problems in constructive ways to enable them to deal humanely with staff-inmate and inmate-inmate problems. This could be aided by an increased emphasis during training on the objectives of the correctional system and of the role of staff in achieving these objectives. The view that "good programs are good security"[51] should guide staff in their work.

Another issue of primary concern to correctional staff concerns their powers. The powers of correctional staff are by their nature defined in relation to the rights of inmates. For example, the powers available to a correctional official to conduct body searches of inmates must be balanced with the inmates' rights to privacy and to be secure against unreasonable search or seizure.

It is essential that correctional officials be granted sufficient power and authority to enable them to perform their function, but it is also important to correctional officials that the limit and extent of their powers be clearly set out in law and easily accessible and understandable to them. Otherwise if they overstep their powers they may leave themselves open to civil suits or criminal charges.

Under current law, the primary source of powers, privileges and protections for correctional officials is the *Criminal Code* which contains over 75 provisions that bestow powers upon "peace officers". As a result of the definition of "peace officer" in s.2 of the *Code*, the full range of police powers are bestowed on "a warden, deputy warden, instructor, keeper, gaoler, guard, and any other officer or permanent employee of a prison".

This automatic attachment of expansive law enforcement powers upon correctional officials should be re-examined, especially in light of the principle of restraint adopted in *CLICS*. Even more critical is the confusing state of the law in regard to how much power an official can use in a particular situation. As a result of the vague or general language used in the *Criminal Code*, this type of question can only be answered by an *ex-post facto* judicial determination.

For example, the degree of force which may be used is basically that which is "reasonable in the circumstances". What may be regarded as reasonable in one situation, may not be reasonable in another. Lawyers and the courts may take months to decide the legality of an action which the staff-member had only minutes, or even seconds, to decide upon. The extent of an official's powers is a matter which has serious consequences for both the official and the inmates, and the present uncertainty in the law is not conducive to a fair or effective correctional system. It is in the interests of both correctional officials and inmates that the law be clear and accessible in regard to powers.

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[50] *Ibid.*, p.45.

[51] *Carson Committee Report, supra*, note 48, p.16.

c) THE PUBLIC

No correctional system can succeed without the understanding of and participation by the public, nor without meeting the public's concerns and expectations. Most members of the public rely on the capacity of the criminal justice system to protect them and their property, and regard the system as contributing to a just, peaceful, and safe society. Moreover, the public is interested in knowing that the resources it contributes are being well-spent and are achieving the desired results.

"Protection of society" as a goal of the correctional system can be achieved in two ways. In the short term, a safe, secure prison system protects society by separating out dangerous inmates while they are serving their sentences. However, society's long-term interests would be best protected if the correctional system has the effect of influencing offenders to begin or resume law-abiding lives.

Most inmates are not considered dangerous, although recent studies have discovered that the public over-estimate the percentage of offenders who commit violent crimes. However, poor prison conditions can build up resentment and frustrations which could make normally non-violent inmates violent, and those already dangerous, more so. The view has been expressed that "the best protection society has is for those who offend to come out of prison, not as a greater danger to the community, but as law abiding, productive and tax-paying instead of tax-draining."[52] Society as a whole has a great interest not only in the workings of the penitentiaries but in the successful reintegration of the inmate into the community upon his release. The correctional system can benefit greatly from community involvement. Members of society should be encouraged to participate in volunteer activities as members of Citizen Advisory Committees, and through parole or probation.

Although society has general interests shared by all its members, it also has various groups with special interests which must be taken into account. These groups range from law enforcement officials to victims of crime.

Police and other law enforcement officials have a need for powers and protections which will enable them to deal with situations which may represent a threat to the community, such as the escape of a dangerous inmate. After-care agencies need the resources to enable them to assist the offender to successfully reintegrate into the community.

Special attention should be paid to victims of crime. The interests and concerns of this group have for too long been ignored by the criminal justice system. Their situation, however, is improving with the trend towards increased interest in the victim. Fresh consideration of the role of the victim has resulted in criminal justice initiatives such as a Federal - Provincial Task Force and proposals in Bill C-18 which encourage the victim's active participation at trial and put a high priority in sentencing on restitution and compensation for victims. At the corrections stage, victims have expressed an interest in having an input in decisions, especially those concerning such things as release, which may directly affect their interests. They also wish to ensure that if they disclose information they will be protected from danger or retaliation from an inmate who, for example, has been denied parole. These and other concerns of victims and other members of the community will be discussed in more detail in a paper dealing with issues related to victims and corrections.

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[52] *MacGuigan Report, supra*, note 6, p.16.

D) RESOLVING CONFLICTING AND CONVERGING INTERESTS

Emerging from this examination of rights and interests is the realization that, although each group involved in the corrections system has distinct concerns which must be addressed, and even though the roles of staff and offenders are in many ways inherently conflicting, there are many areas where their interests overlap and converge. For instance, both inmates and guards, who spend a great deal of time together in the penitentiary, have an interest in a safe institution where their concerns are taken into account and where they have an impact, where appropriate, on the operation of the institution.

We must seek ways to provide a safe, predictable environment which do not promote one set of interests at the expense of another. It is contrary to the interests of all concerned, however, to overlook the fact that the prison, by definition, is a very special type of social environment, marked by significant power imbalances in the relationship between guards and inmates. It is this power dynamic which is at the crux of the day-to-day life of the institution. Any review of the correctional system must recognize that without addressing this power imbalance, any reforms, rather than being meaningful, may amount to little more than window-dressing. Because of this underlying power-dynamic, legal reform in one area may merely result in problems surfacing in another. This point has been made in reference to the procedural safeguards which have been attached to disciplinary proceedings over the past few years. It has been suggested that the advances made on this front have meant that coercive power rather than having been eliminated, has moved and is surfacing in other areas which have not as yet been subjected to any appreciable degree of judicial or other scrutiny.[53]

This discussion points to the importance of two factors: the shared interest amongst both guards and inmates in a secure, smooth-running institution which is able to meet their concerns, and the power imbalance inherent in the present system which allows coercive power to be directed at inmates in such a way that frustrations manifest themselves in hostility and violence.

Taking these two factors into account implies that an institutional environment which is humane and operable for both guards and inmates may be a matter of devising rules that facilitate and encourage voluntary compliance. Recent studies have shown that the great majority of people will comply with rules which they perceive to be fair, if given the opportunity.[54] Therefore, priority ought to be given, in devising rules governing the institution, to compliance enhancement techniques emphasizing participation and cooperation rather than confrontation.

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[53] See Landau, *supra*, note 15, and Richard V. Ericson and Patricia Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press 1982) p.224-225, and Jackson, *supra*, note 4, p.240.

[54] Dale T. Miller, "Psychological Factors Influencing Compliance", and Jackson-Smye Inc., "Compliance Behaviour and Attitudes" both studies prepared for the Department of Justice, 1985.

The first step in facilitating compliance is enhancing the perceived fairness of a rule or decision. This is based on the simple fact that people are more likely to accept constraints or restrictions if they perceive them to be fair. The perceived fairness can be enhanced in a number of ways. The most important is through participation in development of rules or sharing in decision-making by people affected. The more directly involved people are, the more commitment they have to a rule, the fairer they will perceive it to be, and the more willing to comply with it. As a consequence the involvement of both correctional staff and inmates in the development of new correctional legislation is critical if that legislation is to receive their general support.

The Correctional Law Review Working Group recognizes the importance of soliciting the views of staff and inmates through consultations, and taking them into account during the course of the Review. Equally important, the legislative scheme should support the on-going active involvement of staff and inmates in various day-to-day matters which affect them.

Obviously, security and other concerns of a penitentiary limit the areas in which inmates may participate in developing rules and making decisions. Yet there still remain areas where their input would be meaningful and effective, such as in matters concerning inmates' daily lives, like food, clothing and exercise. Another area where input is essential is inmate grievance procedures. Studies have shown that participation by inmates in devising and maintaining inmate grievance procedures is essential to their success.[55]

A recent CSC study is of the view that offenders are so much a part of the correctional system that it is irresponsible not to include them in certain decision-making processes.[56] Moreover, it recognizes that respect for human dignity requires that offenders be listened to.

Though input and participation are crucial, there are other important factors as well. One is acknowledgement by people affected of the value or necessity of the rule, another is that the rule must be sensitive to the circumstances and interests of those affected by it. Equally important, the rule must be clear and applied fairly. A vague, arbitrary or unrealistic rule will be perceived as unfair. A large degree of non-compliance with rules stems from an incomplete or mistaken understanding of the rule. Similarly, ignorance of a rule will obviously not increase compliance. In addition, a rule that is not applied fairly will contribute to dissatisfaction and a reluctance to comply.

A system which depends on participation and cooperation is not only more fair, but more effective as well. This has a great impact on cost-effectiveness, a consideration of great significance in an era of rising costs and diminishing resources.

FURTHERING FAIR AND EFFECTIVE DECISION-MAKING

A) DISCRETION AND ACCOUNTABILITY

Advancing fair and effective correctional decision-making is a major goal of the Correctional

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[55] See *Evaluation of the Inmate Grievance Procedure Pilot Project (Saskatchewan Penitentiary)*, (1979) Ministry of the Solicitor General, Programs Branch.

[56] 0. Ingstrup (Chair.) 1984. *The Report of the Task Force on Mission and Organizational Development: "The Statement of CSC Values".*

Law Review. One of the most influential factors to be taken into account in meeting this goal is that in our system, correctional officials and parole boards are given considerable discretion and decision-making power. They decide on a wide variety of issues ranging from security classification, institutional placement, program assignment, whether to recommend parole, whether to institute disciplinary proceedings, to whether to allow a particular visit. These are all examples of situations where enormous discretion is conferred on officials in matters which have a significant impact on inmates.

A certain level of discretion is generally considered desirable in allowing officials the degree of flexibility necessary to respond to the widely varying circumstances of individual cases. However, serious concerns have been expressed about the lack of accountability or controls associated with much of the discretion in our corrections system, and the unintended and undesirable consequences which arise as a result.

The *Criminal Law in Canadian Society* discusses some of the complex and inter-related concerns about discretion. One of the most obvious concerns is disparity in the exercise of discretion. By "disparity" is meant unexplainable or unjustified variation in the treatment of similar inmates in similar circumstances, caused by decisions made on the basis of unknown, indiscernible or indefensible considerations. A further concern about discretion is its lack of visibility and consequent resistance to public scrutiny and accountability. Moreover, while the law requires various procedural safeguards for certain important decisions, little exists in the way of guidelines or criteria to govern the use of discretion in arriving at a substantive decision. Further concerns exist because corrections officials possess a vast range of powers that are not adequately set out in law. This implies a potential for abuse in procedures governing such areas as search of inmates and in relation to use of force.

In short, the Correctional Law Review is striving to promote fair and effective correctional decision-making, and the Working Group is of the view that in order to do this, the vast amount of discretion in our system must be closely examined in all its phases. The real dilemma over discretion stems from the fact that discretion may be seen at the same time as harmful and helpful. In the former case, discretion is regarded as a threat to individual rights; in the latter, as the necessary means to achieve humaneness and flexibility. The task we are faced with is not to choose between one approach or the other but to establish an appropriate balance between discretionary power on the one hand and formal rules on the other to ensure that discretion can operate according to clearly stated principles and objectives, with the least degree of abuse and the greatest possible degree of accountability.[57]

A balanced approach to discretion recognizes the essential role it plays in our corrections system and that the answer is not to eliminate discretion, but, rather to attempt to confine and structure discretionary power.[58] What is necessary is the development of imaginative techniques which will place restraints on such power without destroying the flexibility, adaptability, responsiveness and individualized decision-making which discretion makes possible.[59]

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[57] *The National Parole Board Report on the Conference on Discretion in the Correctional System, Nov. 17-19, 1981.* (1983) Ottawa: Supply and Services, p.3.

[58] K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) p.102-103.

[59] See J.M. Evans, H.N. Janisch, D.J. Mullan, R.C.B. Risk, *Administrative Law: Cases, Text, and Materials (2nd Ed.)* (Toronto: Emond Montgomery Publications Ltd., 1984) Ch.13; "Confining and Structuring Discretion".

The principal question here is: How can the exercise of discretionary power be structured so that the decisions of correctional staff and administrators and parole board members which affect individuals will achieve a higher quality? The first step in arriving at an answer is to look at the source of much of the uncontrolled discretion in our system.

B) NEED FOR A STATEMENT OF PHILOSOPHY, PRINCIPLES AND OBJECTIVES

The high level of individual discretion that exists within the corrections system has been attributed to the lack of a clearly defined consensus about the purpose of corrections. At a conference sponsored by the NPB to deal specifically with the question of discretion in the correctional system, the most commonly heard explanation for the problems associated with discretion was not the existence of discretionary power *per se*, nor the absence of rules and regulations, but rather the lack of clear purpose or mission within the corrections system.[60] The lack of a commonly understood purpose, it was maintained, results in the exercise of discretionary power on the basis of personal values, public opinion and system-serving goals rather than legitimate and clearly established principles.

It seems clear, therefore, that in order to structure discretion to avoid such arbitrary decision-making, it is necessary that the philosophy of corrections be clearly understood by everyone involved and that the responsibilities of the corrections system be carried out in a coordinated way through services based on common principles.[61]

This view has received strong support in recent studies and reports. The Vantour Report stated that all members of CSC need a conscious commitment to a singular goal, and a clear statement of purpose as to the Service's "mission".[62] This view was shared in the Carson Committee Report[63] and the Ingstrup Report,[64] which maintained that "mutually agreed upon objectives and priorities must be defined and stated as clearly as possible to ensure understanding, obligation and commitment".

The Correctional Law Review Working Group agrees that it is necessary to be clear about the purpose of corrections, and about the objectives of particular functions or activities of agencies. A clear statement of philosophy would contribute to the use of discretionary powers according to legitimate and clearly established principles, rather than according to the unguided and potentially arbitrary feelings of an individual decision-maker.

Accepting the need for a clear statement of philosophy is, however, only the first step. This approach raises a further issue for the Correctional Law Review: the role of law, or, more specifically, legal rules in structuring discretion and meeting the other goals of the Review. Essentially the question is 'how much should be included in law, or even more specifically, set out in legislation?'. There are several approaches to be considered, ranging from an exhaustive, detailed code of legal rules to a legislative framework emphasizing an explicit statement of philosophy. The following chapter will examine these approaches to codification and their implications.

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[60] *Report on Conference on Discretion*, *supra*, note 57, p.25.

[61] This recommendation was made as long ago as 1969 by the *Ouimet Commission*, *supra*, note 47, p.284

[62] J. Vantour (Chair). *Report on Murders and Assaults in the Ontario Region.* (1984), Recommendation 1.

[63] *Supra*, note 48.

[64] *Supra*, note 56, 33(3).

PART IV: APPROACHES TO CODIFICATION

In its most general sense, codification is the "systematic collection or formulation of law, reducing it from a disparate mass into an accessible statement which is given legislative authority."[65]

Much confusion has surrounded the concept of codification. To some, it is the compilation or rearrangement of disparate laws and regulations, such as our current *Criminal Code*. In the case of civil law countries, codification usually denotes a basic piece of legislation, and ideally an exclusive source of law. In its narrowest sense, this tradition does not allow the judiciary to go back to pre-existing or independent bodies of unwritten law; resolution of issues is accomplished by reasoning by analogy from other provisions of the *Code*.

In its 1976 publication, *Criminal Law - Towards a Codification*, the Law Reform Commission of Canada put forward a concept of codification incorporating both traditions. It views codification as a process of making a comprehensive statute on a given matter according to predetermined principles of a formal and substantive nature.

In dealing with codification in the case of the criminal law, the Law Reform Commission viewed as a first priority a statement of principles. It states:

> The Code should derive the principles of criminal law from a broad and coherent policy on crime articulated by the government. This policy should in turn reflect a genuine criminal philosophy, one that is based on the acceptance of certain social or personal values. Only in this way can the legislature avoid trailing passively in the wake of changing values and provide leadership in the promotion of the general welfare and the self-fulfillment of the individual.
>
> It follows that the first step in drafting a *Criminal Code* is to discover those social and moral principles from which a framework of a philosophy of penal law can be constructed. The next step is to bridge the gap between these principles and reality. Finally, the principles must be ordered and formulated taking into account their internal logic and interdependence.[66]

Although the Law Reform Commission's study deals with the whole criminal law, its model for codification can be applied to corrections. Correctional law should articulate and take into account our correctional philosophy: what is corrections supposed to do with an individual sentenced to a term of incarceration? It is our view that including in legislation a statement of philosophy upon which the legal rules are based will make the law more understandable, will structure discretion, and promote fair and effective correctional decision-making. Following logically from the principles are the rules, which are designed to apply in particular situations. The Law Reform Commission defines a rule as a norm which, under prescribed circumstances, creates rights or duties or perhaps decides how an institution will function.[67]

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[65] B. Donald, "Codification in Common Law Systems", 47 *A.L.J.* 160, at 161.

[66] Law Reform Commission of Canada, *Criminal Law-Towards a Codification*, p.48.

[67] *Ibid.*, p.50.

For example, if one of our principles is that offenders are to be accorded humane treatment in our institutions, then flowing from this would be a rule providing for adequate food and clothing. Similarly, adopting the principle that, "The basic programs and services that society offers its members should, subject to reasonable economic and security constraints, be made available to persons under correctional supervision or control", would mean developing rules governing the provision of medical, psychiatric and dental care, legal services, and educational opportunities.

If the rules do not provide for a specific situation, then in attempting to deal with it, a decision-maker would be guided by the principle that an offender is entitled to basic programs available in our society.

The concept of codification has often been criticized as being too rigid, on the grounds that if you place all rules in legislation, this leaves no room for discretion on the part of correctional authorities to deal with emergency situations or new situations, and also robs the courts of judicial discretion. But, as the Law Reform Commission points out, one could never design a complete code to provide for all situations which may arise:

> Codification is not a formal unity of all legal rules. Its purpose is achieved if it expresses in clear terms the general rules and the basic distinctive principles of [criminal law] philosophy. The Code should contain guiding principles for both judges and lawyers. It need not solve each case specifically.[68]

This approach to codification allows for structured discretion within the correctional system, as well as for the judiciary who will be called upon to interpret legislation and the concepts embodied therein. But the exercise of discretion would be guided by stated objectives and principles in the legislation, thus providing consistency, accountability and more understanding of the decisions made.

In a general sense there are two other advantages to be gained from this approach to codification - that of accessibility and certainty. Accessibility implies two things: a) that the law can be found easily, and b) that it is understandable to ordinary citizens. The principles and general legal rules would be part of the code, and the more detailed rules would flow logically from these principles in a rational, coherent manner, thus increasing accessibility and understanding.

With respect to understanding the law, certainly written law is a much better starting point for the lay person than trying to determine the significance of the numerous court decisions. On this point, the Law Reform Commissions states "laws are more accessible to lay people if they are recognized in a logical coherent way with a clear statement of principles on which they are based."[69]

Thus, if we put in legislation the principle that "any punishment or loss of liberty that results from an offender's violation of institutional rules and/or release conditions must be made by an impartial tribunal" then it follows that a set of procedures must be established for impartial disciplinary and parole boards. The principle would embody the rationale for the more detailed rules flowing from it, rendering the rules more understandable and the administrators more accountable.

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[68] *Ibid.*, p.16.

[69] *Ibid.*, p.22.

Another concern which must be addressed is language and structure. Legislation is generally only fully intelligible to those who are legally trained, and even then statutory interpretation is the subject of much litigation. As our objective is to make correctional law understandable to all, then the language used must be as straightforward as possible, with common meanings of words being employed.

Codification could also provide more certainty in the law. A statement in legislation of the exact powers and duties of correctional officers (instead of the current reference to peace officer status in s.10 of the *Penitentiary Act*), would provide more guidance to officers in the exercise of their discretion and promote a more secure environment where respective rights and duties are understood by all. Similarly a definition of "essential medical care" which sets out guidelines for the determination of what is essential, would give more certainty to the law.

Different approaches to codification may be shown by using inmate grievance procedures as an example. As it stands, grievance procedures are not now provided for in law, although it is generally accepted that such procedures are an essential feature of a modern correctional system. Options that might be pursued include 1) detailed legislation setting out all operational details and criteria for evaluation, 2) legislation prescribing only that a procedure exist, with no further details, or 3) legislation embodying general principles and objectives leaving operational details to be included in regulation or policy directives.

The first option of a detailed approach would mean that all the details of procedural requirements and roles of the participants would be set out in legislation much as in the current Commissioner's Directives governing grievances. The advantage of this option is its apparent certainty. The problem, however, is that this option is more likely to foster only minimum compliance by those who may feel over directed and powerless. The net result could be that personal initiative may be seen to be pre-empted and a sense of personal responsibility diminished. As a result there may be compliance with stated procedures, without any real progress in the fundamental goal of speedy and efficient problem solving.

The involvement of the administration, staff and inmates in the design of the procedure (tailoring of the procedure to the particular institution) and a carefully monitored implementation period are features identified by studies with a successful grievance process. A statute with too much detail appears incompatible with this flexible approach.

The second option is to provide only for the existence of the grievance procedure, leaving all procedures and details to the discretion of the administration. The advantage of this option is the flexibility given to correctional authorities to make changes in policy and priorities. However, this same flexibility may be its prime disadvantage.

Studies have shown that features such as external independent review, written responses and opportunities for inmate participation are essential if grievance procedures are to be a credible and fair means of resolving inmate complaints. If serious consideration is being given to the proposition that grievance procedures can and should serve as an effective supplement to judicial recourse, we must recognize the importance of those features which promote credibility and supply procedural protection by providing for them in law.

The third option combines the advantages of each of the previous options. By legislating the principles, objectives and essential requirements but leaving the details to the initiative of those who must account for the efficacy of the system, both the interests of fairness and of institutional initiative and responsibility are served. This would allow the institution to develop the approach most suitable to its needs but would enable a court to determine whether an internal procedure was providing consistent and adequate means of redress by reference to the guidelines contained in the legislation.

Our conclusion, in regard to codification, is that an overly detailed code will not achieve our goals. Corrections is a complex field, characterized by decisions involving mixed objectives. We recognize that a significant degree of discretion is not only inevitable but desirable, and that legislation can seldom identify either the exact nature of a problem or its precise cure. Therefore, rather than developing an exhaustive code of detailed legal rules to govern conduct in every situation, we are of the view that our goals would be better met by including in legislation a statement of correctional philosophy from which legal and policy rules are derived and which will guide their application and interpretation. This approach to codification will mean being explicit in the legislation in regard to philosophy of corrections, as well as objectives of all major agency functions and activities such as parole, remission, classification and placement. It also means that the rest of the legislation, including regulations, must be framed to be consistent with the stated principles and objectives. Policy will be developed by the correctional agencies themselves to reflect the stated philosophy.

This approach raises several important questions in regard to a legal framework which will now be addressed: first, which matters should be included in legislation, regulation, or policy; and second, how will our approach to codification affect the amount of litigation.

STATUTE, REGULATION OR POLICY?

In considering the question of which matters should be included in statute, regulation or policy, we shall first look at whether there are any rules or general principles that determine whether a matter is dealt with in either a statute or regulation. At the federal level, the power to legislate belongs exclusively to Parliament. It has a wide discretion in the forms in which it expresses its will - it can legislate in great detail (e.g. *Income Tax Act*) or can merely outline the broad purposes of the legislation (e.g. *War Measures Act*). Parliament also may delegate power to the Governor in Council. The main purpose of this delegation is to prevent Parliament from being drowned in a myriad of detail. Another important purpose is the relative ease with which regulations may be changed, thus making them a much more suitable vehicle for matters which are likely to change over time, such as fees. The process by which statutes and regulations become law is set out in *Appendix A*.

From a study of the current correctional legislation it is clear that matters such as the establishment of the correctional authority, certain powers and duties of staff, and certain rights and responsibilities of inmates are specified in law. However no clear pattern emerges as to what should be specified in statute, as opposed to regulation, nor a consistent framework in which to deal with the various subject areas. Similarly, there does not appear to be any indication as to why the delegation of the legislative power to Cabinet is broad in the *Penitentiary Act*, and narrow in the *Parole Act*.

It appears that there are no precise criteria upon which to base the decision to place matters in statute or regulation. The matters dealt with by regulation must be authorized by the statute, and usually include the formulation of subordinate provisions of a technical or administrative character. Thus, one writer has concluded that generality is the hallmark of the statute law, whereas matters of a more technical nature belong in regulation.[70] Another reason given for the delegation of the legislation-making function is that it allows departments to act quickly and deal with emergencies more expeditiously than Parliament.[71] Certainly the process of regulation-making is much speedier than amendments to statute, and thus matters subject to change over time are often better placed in regulation.

This type of convenience is not the only consideration, however. The essential features of a correctional system should be approved by Parliament to ensure as much public input and scrutiny as possible. The correctional system should reflect societal values with respect to the relative importance of protection of the community and restrictions on the liberty of individuals. As well, the public through Parliament should approve the critical aspects of a system which has such a great impact on individual rights.

It is therefore our view that, in addition to the establishment of the correctional agencies and authority for their functions, as well as staff powers, new correctional legislation should also contain a statement of philosophy, specific objectives for each correctional program or activity, the principle features of each such program or activity, and should articulate individual rights in the correctional context and provide for their protection. Regulations would complement and particularize the statute; they would flesh out the details of many of the statutory provisions, and deal with matters which might be expected to change over time.

A related question that arises is which matters should be included in regulations and which in policy directives or guidelines? In order to answer this question, it is necessary to consider the legal status of directives, such as the Commissioner's Directives, under our present system. As pointed out in the first section of this paper, the Supreme Court of Canada, in the case of *Martineau (No.1)*, held that Commissioner's Directives, though authorized under statute, are clearly of an administrative, rather than a legislative nature, and as such do not have the force of law. Despite a strong dissent by Laskin, Chief Justice at the time, the majority judgement characterized these directives as basically internal rules of management in respect of which no duty of compliance can be enforced by inmates.[72]

Accepting the ruling of the Supreme Court of Canada in *Martineau (No.1)*, the main distinction between the two types of rules is their legal nature; rules in statutes and regulations are legally binding and must be complied with in all cases, but rules in policy directives are not legally enforceable at the instance of an inmate. There are a great many Commissioner's Directives which inmates are expected to observe, but they cannot in turn rely on the Directives to establish any rights for them in the obligations they impose on staff. However, inmates may resort to the internal grievance procedure (set out in the Commissioner's Directives) in an effort to secure compliance.

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[70] D.R. Miers and A.C. Page, *Legislation* (Maxwell, London, 1982) p.167-8.

[71] Levy, "Delegated Legislation and the Standing Joint Committee on Regulations and Other Statutory Instruments" G. Bruce Doern and S. Wilson, *Issues in Canadian Public Policy*, (Methuen, Toronto, 1974).

[72] The decision has been criticized on many grounds. (See in particular, H.N. Janisch, "What is Law?" - Directives of the Commissioner of Penitentiaries and Section 28 of the *Federal Court Act* - The Tip of the Iceberg of "Administrative Quasi-Legislation" [1977] 55 *Can. Bar Rev.* 576.) From our point of view, the decision of the Supreme Court of Canada is authoritative on the issue.

Another major difference between rules in statutes and regulations and those in Commissioner's Directives is found in the process by which they are made. It is evident from *Appendix A*, which sets out the process in each case, that Commissioner's Directives are made internally, that is within CSC, with no outside input or scrutiny. This is in sharp contrast to the scrutiny and input required in the case of a statute, and to a lesser extent, regulations. As a result of the difference in process, policy directives are much more flexible; they are internally made and can be changed much more readily than either a statute or regulation.

These two characteristics of policy directives, that is, their non-binding and flexible nature, indicate that they are most appropriate for internal management matters. In fact, according to *Martineau*, Commissioner's Directives are no more than directions to employees as to the manner of carrying out their duties in the administration of the institution in which they are employed.

Accepting this approach means that the Commissioner's Directives would be reserved for operational policy, for example, instructing employees in how to carry out their jobs or with details on operations and procedures. They should not be the sole authority in matters directly affecting inmate rights although they can appropriately govern the way in which the institution gives effect to these rights. This approach would allow administrators the necessary flexibility to operate the institution, with the added advantage of having rules dealing with inmate rights in a legally binding form rather than a non-legally binding policy directive.[73]

This latter point is of critical importance not only in terms of protecting inmate rights, but also in making any limitations on individual rights which may be justified in the corrections context. In terms of limitations on constitutional rights, as noted previously, the *Charter* states in its section 1 limitation clause that any limitations must not only be reasonable and demonstrably justified in a free and democratic society, but *prescribed by law* as well.

This phrase has been interpreted to mean that the limitation must be laid down by a rule of law in a positive fashion and not by mere implication.[74]

> It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness

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[73] The need for legally binding rules to increase the accountability of penitentiary authorities was recognized in the *Parliamentary Sub-Committee Report* in 1977, although their recommendation was that the Commissioner's Directives should be legally binding. This approach was also suggested by J. M. Evans in "Remedies in Administrative Law" in Special Lectures of the Law Society of Upper Canada (1977). While it recognizes the need for accountability, the Working Group is of the view that having inmate rights dealt with in legislation and regulation, both of which are subject to a more open and democratic law-making process than Commissioner's Directives, would more successfully meet concerns of accountability. In addition, reserving Commissioner's Directives for operational policy in regard to inmate rights and other matters would give the correctional authorities the flexibility necessary in managing an institution.

[74] See *Federal Republic of Germany v. Rauca*, 1 (1982) 30 C.R. (3d) 97 (Ont. H.C.J.), affirmed, (1983), 4 C.C.C. (3d) 385 (Ontario C.A.) and *Le Canadien Newspapers Company Limited and the Queen*, (1984), 16 C.C.C. (3d) 495 (Man. C.A.).

with which courts will view any interference with the fundamental freedoms.[75]

This issue is obviously one of critical importance for the whole area of offender rights and remedies. The Working Paper on *Offender Rights* will deal with it in greater detail. The paper will also consider the implications of placing guidelines that directly affect inmates rights, now found in the Commissioner's Directives, in the statute or regulations.[76] It will further deal with implications of establishing policy directives pursuant to statutory authority from the perspective of offender rights and remedies.

For the purposes of the present paper, we can conclude that in developing a legislative framework, matters to be dealt with in the directives as opposed to statute or regulation should be of an operational policy nature involving the day to day activities of employees in carrying out their duties, and should not directly affect inmate rights. Obviously, most activities and duties of penitentiary staff affect inmates. What we are saying, however, is that the directives should not have the authority to limit inmate rights, nor should they be the sole source of inmate rights since they are not legally binding or enforceable. Issues concerning redress to an inmate who feels he has been adversely affected by a directive will be explored further in the *Offender Rights and Remedies* Working Paper.

EFFECT ON LITIGATION

The final question to be dealt with is whether our legislative framework will increase the amount of litigation. Concern has arisen, based on U.S. experience, that inmates will be streaming into the courts in record numbers to have disputes, no matter how minor, settled.

The response of the Correctional Law Review Working Group to this concern is that our approach of a system of legal rules based on a statement of philosophy should limit potential litigation, rather than increase it. In general, it may be said that the courts are used for two basic purposes; to interpret and articulate the scope of constitutional and other provisions and to settle disputes between parties. Obviously, this is a very simplified description and in practice, the two purposes overlap in many cases. Yet, for our purposes, considering each separately may be useful. In regard to use of the courts to interpret the scope of rights, it appears that increased litigation in the American system is most prevalent in states that have not adopted a comprehensive legislative scheme. Resort to the courts is most often made on constitutional grounds, in the absence of legislation, rather than in regard to legislative provisions.[77] With the advent of the *Charter*, it may be assumed that litigation will increase if *Charter* rights and limits on them are not articulated in clear terms in correctional legislation. A comprehensive legislative scheme such as we are proposing, that is fair and effective because it takes into account the interests of all participants in the system, is intended to eliminate a great deal of the need for resort to the courts.

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[75] *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, (1983) 147 D.L.R. (3d) 58 (Div. Ct.); affirmed, (1984) 5 D.L.R. (4th) 766 (Ontario C.A.); leave to appeal to S.C.C., granted April 4, 1984.

[76] Section 29(3) of the *Penitentiary Act* would have to be narrowed, for one thing.

[77] U.S. experience is discussed in Walter S. Tarnopolsky, "The Anticipated Effect of the *Canadian Charter of Rights and Freedoms* on Discretion in Corrections", in *Report on the Conference on Discretion, supra*, note 23.

When it comes to settling disputes, our legislative scheme would rely on adequate means of redress through appropriate judicial remedies as well as through more informal procedures that will satisfy the need for impartial review and effective dispute resolution. Providing effective internal redress through inmate grievance procedures will enable the development of just solutions without unnecessary resort to the courts. With non-judicial remedies, administrators are left with a role to initiate solutions and exercise their expertise; and staff and inmates have an opportunity to participate in creating and maintaining solutions.

We recognize, of course, that judicial intervention has played and continues to play an important role. It has legitimized both the concept that inmates retain rights, and the role of outside inspection and scrutiny. With the *Charter*, the courts have assumed even greater power and importance. Our view is, however, that the courts should be relied on as a last resort, rather than a first measure. The point which we wish to stress is that by developing new correctional legislation we have an opportunity to shape correctional policy and practice for the future. For the reasons discussed in this paper, such an approach is vastly preferable to a future of incremental - and potentially inconsistent - change forced upon the correctional system by the courts. This approach allows the correctional system, taking account of the views of all concerned, to meet its goals. The proposed legislation, fashioned to promote voluntary compliance, would seek to structure rather than eliminate discretion while ensuring at the same time that inmate rights, constitutional and otherwise, are protected. It is important to remember that the legislation would not only articulate the meaning of *Charter* rights in the correctional context, but would also set out in clear terms the scope of other rights and duties.

In short, legislation can be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other. The outcome is rarely viewed as an improvement for everyone, and in fact often maximizes polarity.[78] In considering long-term solutions, our approach is to avoid the need for resort to the courts by developing rules that recognize yet control discretion in response to principles that are understandable to inmates, prison staff and administrators, and the public. The combination of effective grievance procedures and a reasonable, balanced system of legal rules should reduce resort to the courts while providing for "justice within the walls".

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[78] These points are forcefully made by Michael Jackson in "Inmates' Rights: the Case Law and its Implications for Prisons and Penitentiaries", in *Report on the Conference on Discretion*, *Supra*, note 57.

CONCLUSION

The main task of the Correctional Law Review is advancing legislation for the federal correctional system that meets the following goals: (i) reflects the philosophy of Canadian corrections, (ii) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; and (iii) facilitates the attainment of correctional goals and objectives through the establishment of certain correctional principles in law.

Factors which affect the form and content of such legislation were examined in this paper. It is our view that legislation that is most suitable for our purposes would contain an express statement of philosophy, would clearly establish the agencies and authority for their functions, as well as clearly state the objectives of each specific agency function and activity, and the principle features of each function or activity, and would provide for rights of inmates and any limitations on rights. Details of the legislative provisions would be set out in the form of regulations. The operational policy of the agencies would be contained in policy directives.

Every effort is to be made to ensure that the content of correctional legislation, regulations and directives is consistent with the *Charter*, with the philosophy of Canadian corrections, and with Canada's obligations under international law.

By taking into account the interests of all those affected by correctional legislation, voluntary compliance with the legislation should be promoted. And by recognizing the important role that discretion plays in corrections, this approach to legislation should allow discretionary power to be exercised in a more accountable manner in a way that promotes good correctional decision-making while respecting the dignity and fair treatment of inmates.

The resulting legislative scheme should be clear and unambiguous, facilitate operations, and give guidance to correctional staff. Clarity of purpose, objectives, and operations should permit inmates and the public, as well as judges, to better understand the "meaning" of a sentence of imprisonment in Canada.

APPENDIX "A"

1) STATUTE AND REGULATION: LAW MAKING PROCESS

The following is a brief overview of the process by which statutes and regulations become law. New legislation is often introduced in response to complaints from the public, lawyers, provincial governments, etc. Once a need for new legislation is identified by Cabinet, legislation is drafted and tabled in the House of Commons (first reading). (Legislation may occasionally be tabled in the Senate first, but must then go to the Commons before being passed.) This tabling is often accompanied by a press conference, held by the responsible Minister to explain to the public the nature and rationale for the proposed legislation.

At second reading, the Minister responsible outlines the general thrust and policy implications of the proposed legislation in the House of Commons. A debate regarding the principles follows, after which the legislation is forwarded to a Parliamentary Committee for consideration as to detail as well as principle.

At the Committee stage, there is opportunity for public input in the form of expert witnesses or public interest groups. When the Bill returns to the House of Commons there is further debate and the possibility of more public input. The process of a three readings and detailed examination by Committee is then repeated by the Senate. The Bill is given Royal Assent by the Governor General, and becomes law on that date or on any later date specified in the Bill.

Regulations, on the other hand, are enacted with much less public scrutiny. Once a need for change is identified (again quite possibly through public input), regulations are drafted in the department responsible and, pursuant to section 3 of the *Statutory Instruments Act*, are examined by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice to ensure that they are within the terms of the *Act*, and do not trespass unduly on existing rights and freedoms, and are drafter in accordance with established standards. They are then discussed and approved by Cabinet. After being enacted, these regulations must be reviewed by the Standing Joint Committee on Regulations and other Statutory Instruments, (which includes members of both the Senate and House of Commons) which has the particular mandate to ensure that the power to make the regulations is authorized by the statute, and that the regulations comply with the *Statutory Instruments Act*. Although this *Act* is a means of safeguarding against abuses of delegated power, it does not permit public input prior to enactment of regulations. There are, however, certain regulations which are published prior to enactment though this is an exception to the normal procedure.

A problem often cited with respect to regulations is their limited accessibility to the public. Section 11 of the *Statutory Instruments Act* provides for publication of all regulations in the *Canada Gazette* within 23 days of the registration of the regulation. (Section 11(2) states that the regulation is not invalid, due to non-publication, but that no person can be convicted of a contravention of the unpublished regulation unless reasonable steps were taken to bring the regulation to the person's attention). However, given the thousands of regulations and orders which are published in the *Gazette*, one can question how accessible regulations really are to members of the public.

2) PROCESS OF ENACTING ADMINISTRATIVE DIRECTIVES

The process of enacting or amending the Commissioner's and other administrative directives is internal to the Correctional Service of Canada and thus does not have the public scrutiny that either legislation or regulations have. Series 000 of the CSC manual deals with the directives program and Divisional Instruction 000--3-01.1 specifies that a draft directive must be developed in consultation with functional managers within the sponsoring branch of CSC, and other branches and divisions. In practice there may also be consultation with regional management; the nature of the consultation is determined by the individual Regional Deputy Commissioner. With respect to changes to Commissioner's Directives, approval must be obtained from national Senior Management Committee members.

Divisional Instructions (which set out the procedure by which policy is to be given effect) are approved by CSC's Legal Services and Regional Executive Officers, or where Divisional Instructions are developed at the same time as related Commissioner's Directives, both are approved by the Senior Management Committee. Regional Instructions (procedure and guidelines for implementing policy, in response to peculiarities specific to the operations of a region) are approved by Regional Senior Management Committee members. Standing Orders (procedures and guidelines peculiar to the specific institution or office) are approved by the local Senior Management Committee members. Routine Orders (weekly orders providing information and direction on specific short-term activities peculiar to the unit) are issued by the officer in charge of the unit, with no additional approval. The directives, instructions and orders come into effect as soon as they are signed, at which point they are distributed internally within the Correctional Service of Canada.

Instruction 000-40-1.1 outlines "Public and Inmate Access to Internal Directives". With respect to the public, this merely provides that requests be referred to Regional Chiefs of Information Access. Access is then regulated by the *Access to Information Act*.

Community volunteers are to be provided with reasonable access to CSC Manual documents, according to the Divisional Instruction, and at least one complete copy of Commissioner's Directives and Divisional Instructions must be provided in each institutional inmate library for inmate access. (There are some documents exempted for security reasons.)

Thus, there is some accessibility of the correctional administrative directives for inmates and the public. Nonetheless one must also consider in practical terms how accessible these directives really are, given that they encompass seven large volumes and there is only one complete copy in most institutions. (In fact, if the Routine and Standing Orders are included, the administrative directives cover 36,000 pages.)

APPENDIX "B"

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Release and Clemency

Staff Powers and Responsibilities

Sentence Computation

Native Offenders

Offender Rights

Mentally Disordered Offenders

International Transfer of Offenders

Victims and the Correctional Process

The Relationship between Federal and Provincial Correctional Jurisdictions

CONDITIONAL RELEASE

Correctional Law Review
Working Paper No. 3,

March 1987

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the *Department of the Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons & Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after-care agencies, victims' groups, an employees' organization, the Canadian Association of Paroling Authorities, one Parole Board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this second round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor-General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

INTRODUCTION AND PART I

Describes the purpose of the Paper and situates conditional release in the context of the purpose and principles of the criminal law and corrections which have been articulated in earlier papers. In particular, the components of the purpose which are relevant to conditional release are:

- carrying out the sentence of the court, having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;
- providing the degree of custody or control necessary to contain the risk presented by the offender;
- encouraging offenders to prepare for eventual release and successful reintegration in society through the provision of a wide range of program opportunities responsive to their individual needs.

The principles which are of particular relevance to conditional release are:

- in administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order;
- discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls;
- all individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures;
- lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by correctional services.

PART II

Discusses the current objectives of conditional release and the various objectives which it has been suggested conditional release ought to serve; describes the advantages, disadvantages and key issues surrounding the pursuit of each.

The objectives and functions discussed are: reintegration of offenders into the community; protection of the public through the assessment of risk over time; humanitarian purposes; mitigation of sentence disparity; reduction of time served and penitentiary populations; reward for good behaviour while incarcerated; and reconciliation between the offender and the community or victim.

PART III

Delineates the most important or controversial issues in the conditional release area. These are: what objectives, if any, should be pursued by programs of conditional release; visibility and accountability issues in conditional release, including the balance between accountability and independence of releasing authorities, and the need for clear policies and decisions; the relationship between sentencing and release authorities in the determination of the amount of time ultimately to be served by the offender; differences between the federal and the provincial/territorial systems of conditional release; violent recidivism among released offenders and what approaches should be taken to it; the costs and use of incarceration in Canada, and the role of conditional release programs vis-à-vis trends in the use of incarceration; the adequacy of procedural safeguards surrounding decisions in conditional release; and the controversy surrounding earned remission (time off the sentence for good behaviour) and mandatory supervision.

INTRODUCTION

One of the most significant aspects of the correctional systems of Canada and other countries is the provision for conditional release of an offender prior to the expiration of the sentence imposed by the judge. Conditional release exists in many forms, ranging from an absence of a few hours under escort to an unsupervised release from prison as the result of time off for good behaviour. An act of executive clemency, although rarely granted, can also result in release from imprisonment. Besides being complex in its many forms and manifestations, release is also complicated by virtue of being administered by thirteen different jurisdictions - the federal government, provinces and territories - and by officials at many different levels and positions in the criminal justice system. The laws and administrative directives governing release also exist at various levels of government and administration.*

Release is an important subject for examination as part of the Criminal Law Review because the Review is particularly concerned with ensuring that the individual parts of the criminal justice system function in an integrated fashion. One of the most confusing aspects of release, in the minds of the general public and of professionals in the system, is how it relates to sentencing. This question of the interaction between sentencing and release is one of the critical issues to be addressed.

Because of the importance of conditional release, it merits a separate Working Paper in the Correctional Law Review. This Working Paper will therefore raise the key issues which will need to be addressed as part of this fundamental review of the law pertaining to corrections.

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* For a more detailed description of the workings of and issues surrounding the administration of conditional release at the federal level, see *The Solicitor General's Study of Conditional Release* (1981), available from the Ministry of the Solicitor General. A description of some of the complexities of the federal-provincial-territorial split in jurisdiction in conditional release is provided in *Appendix B*.

Among the most important issues to be addressed in a fundamental review of conditional release are:

- What purposes, if any, should the various forms of conditional release serve?
- What constraints should apply to the exercise of the discretion to grant conditional release, such as:
    - minimum periods which must be served prior to eligibility?
    - limitations on the types of offenders and offences which will be eligible for conditional release?
    - limitations on the duration of temporary absences?
    - substantive guidelines for the granting and refusal of release?
- What procedural safeguards should attach to the making of various conditional release decisions?
- What changes, if any, should be made to the controversial programs of mandatory supervision and earned remission?

Throughout our discussion will recur the question of continual interest to the Correctional Law Review: which of the various issues pertinent to conditional release should be addressed in law or regulations, and which should be left to administrative policy and administrative directives? This is a central question posed by the Correctional Law Review Project, and must be answered in each substantive area, including release.

For correctional managers, the questions raised by conditional release will likely be of a very different type. The day-to-day concerns of the manager lie with practical problems such as preserving the stability of the prison environment and ensuring that decisions and practices conform to established policy and procedure. To some extent, however, the manager's practical concerns and the fundamental questions posed by the Law Review will merge; what is being sought by all concerned is a system which is clear in its purpose, and thus open and accountable in its activities.

Part I of the paper reviews the proposed philosophy of corrections and its implications for release. Part II reviews the objectives of release and seeks readers' opinions about each. Part III surveys the key issues to correctional release and asks readers to respond to the issues they perceive to be of most importance.

PART I: THE PHILOSOPHY OF CORRECTIONS

In June 1986, in a Working Paper entitled *Correctional Philosophy*, a tentative statement of correctional purpose and principles was proposed.[1] This statement contains a number of aspects which are of particular interest in the conditional release area.

The overall purpose of the correctional system is posited in the *Correctional Philosophy* paper as being "to contribute to the maintenance of a just, peaceful and safe society" through certain activities or strategies. The first of these is by:

a) carrying out the sentence of the court, having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources.

This purpose has - or appears to have - particular significance for questions about conditional release. The opinion is frequently expressed by some members of the public that when a sentence is imposed, "six years should mean six years", and not less as the result of decisions made by correctional personnel about earlier release. This view is held for a variety of reasons which will be examined in detail below.

The *Parole Act* and Canadian jurisprudence do, of course, recognize the current workings of conditional release. The provision for up to one-third of the sentence to be remitted for good behaviour in penitentiary or prison is found in statute, while *Regulations* provide that one-third of the sentence must be served in typical cases prior to eligibility for full parole. These parameters of the sentence are the constraints within which release operates, and release cannot therefore, under the current law, be accurately said to be "interfering" with the carrying out of the sentence.

However, the public's concerns are real, and their apparent basis (that sentencing and release authorities are working at cross-purposes) must be addressed. Although strategy a) does not directly resolve this question, it will have to be resolved in the course of the Review.

The second strategy through which corrections achieves its overall purpose, as stated in the *Philosophy* paper, is by:

b) providing the degree of custody or control necessary to contain the risk presented by the offender.

The risk dimension is one which, as the statement implies, corrections in general and releasing authorities in particular must be, and are, constantly aware of, and will invariably consider in making any decision about offenders. Although the statement requires correctional authorities to use only the *necessary* degree of containment in each case, it places a positive burden on the system to assess and provide what is necessary for containment.

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[1] *Correctional Philosophy* is the first Working Paper of the Correctional Law Review.

The proposed philosophy also provides that the overall purpose will be carried out through:

d) encouraging offenders to prepare for eventual release and successful reintegration in society through the provision of a wide range of program opportunities responsive to their individual needs.

This statement recognizes that the vast majority of offenders will eventually return to society, either through the expiration of a finite sentence or through other avenues. This being the case, it is important for corrections to take steps which will assist in the functional reintegration of offenders into society. These steps will include not only a wide range of programs which will (it is hoped) assist offenders in practical ways to adjust to law-abiding society, but also a process which encourages the offender to plan against the eventual date of his release and make sensible choices relevant to that release.

Here, a distinction should be drawn between questions which must be addressed regarding the *decision to release* an offender prior to sentence expiration, and questions which must be addressed regarding the requirement of *supervision of the offender after release*. The two processes are linked under our current system, but in fact need not be interdependent. The correctional philosophy statement appears to mandate the provision of programs which will, if pursued by offenders, better equip them for their eventual return to society and encourage them to do some sound planning for that return. The question of how that return will come about - through a discretionary decision by correctional authorities or through the expiration of a sentence - is left open by strategy d).

There are several principles in the philosophy statement which are particularly relevant to conditional release. Perhaps the most important among these is that:

4 In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirement of the disposition, consistent with public protection and institutional safety and order.

This principle is closely related to component b) of the Purpose, which calls for the necessary degree of control or custody to contain the offender's risk. This principle emphasizes that what is considered "necessary" and how the necessary containment is carried out must not exceed the minimum intervention which is considered adequate to contain the offender's risk.

For release, this principle is especially important. It implies that for many offenders who are not a risk to the public and who have satisfied the minimum requirements of the sentence (such as having served one-third of the sentence), continued incarceration is an expensive, frequently destructive and inappropriate option.

A further proposed principle of corrections states that:

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

While this principle applies to all correctional processes, it may be of special significance to conditional release, where the decisions in question are ones which involve the liberty or continued confinement of the offender. Liberty interests have a special significance in our society, and it is critical that releasing decisions be as visible as possible, in order to preserve the appearance and reality of fairness. The controls applicable to the exercise of this discretion should be both substantive and procedural; offenders, staff and the public should be permitted to know who will normally be considered a good candidate for release, and how the releasing decision will be made.

Another principle which is related to the last states:

> 6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

Fair and effective grievance and appeal procedures are among the most important controls on discretion. In the federal system, although the decisions of the National Parole Board are reviewable by the courts to ensure conformity to procedural fairness standards, release decisions are - and likely should remain - outside the purview of certain administrative remedies which apply to the workings of the penitentiary system, such as the Correctional Investigator and the Inmate Grievance Procedure.[2] The importance of appropriate administrative remedies in resolving issues without the use of the courts is, however, indisputable. It should be acknowledged also that appeal to the courts on questions of the substantive fairness of parole decisions may eventually be available.

The final principle from the Philosophy paper which is particularly pertinent to conditional release states:

> 7 Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by correctional services.

Community interests, in the form of the need to remain safe from violent and other crime, are of course the key determinants of releasing decisions. The community's interest in corrections and parole goes, or should go, further, however: lay participation in the post-release process of reintegrating the offender into the community can make the difference between success and failure. This principle has particular significance for Native offenders, whose cultural uniqueness presents particular difficulties for conventional methods of pre-release and post-release planning and assistance.[3]

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[2] The Office of the Correctional Investigator was established in 1973 pursuant to Part II of the *Inquiries Act*. The duties of this office are to investigate on the initiative of the Correctional Investigator, on request from the Solicitor General of Canada, or on complaint from or on behalf of inmates, and to report upon problems of inmates that come within the responsibility of the Solicitor General. Some complaints are excluded from the purview of this office, particularly those related to parole preparation. Inmate grievance procedures have been established by the CSC Commissioner's Directives (081) to provide a mechanism within the Correctional Service for resolving complaints by inmates. The Directive describes when grievances may be filed and how they shall he handled. Grievances are discussed in more detail in the Correctional Law Review Working Paper on *Correctional Authority and Inmate Rights*.

[3] A special Working Paper will be devoted to a consideration of the special status and needs of Native offenders which are relevant to the Correctional Law Review.

The other principles articulated in the *Correctional Philosophy* are of somewhat less significance to conditional release. The full text of the purpose and principles proposed to govern corrections is reprinted at *Appendix C*.

PART II: THE OBJECTIVES OF CONDITIONAL RELEASE

Despite the fact that conditional release is a well-established feature of most modern correctional systems, for some members of the public its continued existence is controversial. This view may be held for various reasons, among which is that certain people question some of the purposes that appear to be served by conditional release, such as the mitigation of punishment. In addition, the criteria for release contained in the *Parole Act* seem outdated and difficult to interpret.

Different forms of conditional release will be granted for different reasons. Temporary absences, which in the federal system normally last only a few hours, may be granted for medical purposes, or broadly humanitarian reasons such as preserving family ties through attendance at family funerals. Day paroles, which are normally granted for a four-month period, are used to test the offender's readiness for further responsibility. Remission is intended to provide a control and incentive for good behaviour while the offender is incarcerated.[4] According to the *Parole Act*, parole serves at least three general considerations. Parole may be granted if:

(i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,

(ii) the reform and rehabilitation of the inmate will be aided by a grant of parole, and

(iii) the release of the inmate on parole would not constitute an undue risk to society.

The first two criteria are of little apparent help in guiding individual parole decisions. They appear to be premised on notions of the rehabilitative effects of imprisonment - one questioned even by correctional administrators today - and the rehabilitative effects of a grant of parole or the supervision provided through parole - the precise impact of which on a given offender is generally considered to be very difficult to predict. This leaves the third criterion, consideration of the risk presented by the offender. As has been seen from our discussion of the philosophy of corrections, consideration of risk is and must be a constant feature of corrections. However, the third criterion does not give direction to the decision-maker regarding what constitutes an "undue" risk, and which risks are to be avoided: risk of serious crimes, risk of minor infractions, or lack of conformity to those conditions of parole which do not pertain directly to criminal activity?

The discussion which follows reviews all the various purposes and functions commonly associated with conditional release. A distinction is made between "purpose" and "function" because release serves - or is thought to serve - numerous functions which are not part of its statutory mandate, as described above. Some of these functions are controversial; as noted earlier, many members of the public express concern about the function of mitigating punishment which parole appears to serve. However, it is critical to examine all the statutory purposes and informal functions of release, because any alteration to the programs of release which would affect functions as well as purposes could send shock waves throughout the correctional system.

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[4] The statutory authorities for remission, temporary absences and parole are referred to in *Appendix B*, which also provides a brief explanation of remission. The reader may wish to refer to the Report of the Working Group, *Solicitor General's Study of Conditional Release* (Ottawa: Ministry of Supply and Services Canada, 1981), for a more detailed explanation of these terms and discussion of their availability and use, as well as issues surrounding them (see esp. pages 47-92).

REINTEGRATION INTO THE COMMUNITY

As has been seen, the *Correctional Philosophy* paper endorses reintegration as a part of the overall purpose of corrections, echoing the statement in *The Criminal Law in Canadian Society* (which sets the objectives and principles for the criminal law as a whole) that "whenever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for ... opportunities aimed at personal reformation of the offender and his re-integration into the community".[5]

The principal vehicle through which conditional release serves this end is the supervision of offenders after release. Correctional workers attempt to assist the offender to adjust in functional ways to life in a free society. With the authority implied in the ever-present threat of return to the institution, parole officers operate through counselling, the provision of practical help such as loans or assistance in finding housing, and the use of structured residential programs. Many offenders have very few of the practical life skills usually considered essential to survival as a law-abiding citizen: the ability to read, finding decent housing and reputable companions, applying for retraining programs, making a good impression before a prospective employer, establishing and living within a budget, coping with frustration and anger, even eating a proper diet. The supervision provided after release is ideally intended to provide a follow-through in the community to the life-skills training which is begun in the institution.

One suggested model for parole, in fact, would increase the connection between institutional treatment programs (broadly defined) and the release process by making the grant of parole conditional on the inmate's completion of pre-established institutional programs considered by institutional and releasing authorities to be responsive to his needs. This model - sometimes referred to as "contract parole" - would thus ensure, as far as possible, that institutional and release decisions would be integrated, that joint planning would be directed towards the ultimate release of the offender, and that the inmate would know precisely what institutional activities he would need to pursue in order to receive a grant of parole. This model normally contemplates that a "contract" would be entered into only with those inmates who are considered suitable for release of some kind; offenders who are believed to be dangerous would never be paroled in any event. This model is, of course, premised on the availability of quality programs in which the releasing authority can place some confidence, and to which the offender might apply himself with some sincerity.[6]

Another suggested approach to reintegration programs addresses itself to the universality or selectivity of application of these programs. Correctional programs are severely limited by constraints on resources, and although parole and probation caseloads vary greatly, they rarely permit extensive time between the officer and the offender. For these and other reasons, it is sometimes suggested that corrections' reintegration efforts should be directed more selectively to those offenders who most need them or are most likely to benefit from them. In this way, limited correctional resources would be used where they are most likely to do some good, and not applied with the same vigour to cases where the risks are greater or the probable benefits are less.

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[5] Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Department of Justice, 1982), pp. 62-63.

[6] Contract parole has been tried in such U.S. states as Wisconsin and California where a "mutual agreement" may be struck between offender and releasing authority, detailing the conditions which would have to he fulfilled by the offender in order to receive a parole. See, e.g., A.H. Rosenfeld, *An Evaluative Summary of Research: MPP Program Outcomes in Initial Demonstration States* (College Park, MD: American Correctional Association, 1975); D. Glaser, "Protocol for Mutual Agreement Programs in Parole Release", Chap. 29 in R.M. Carter, D. Glaser, L.T. Wilkens. *Probation, Parole and Community Corrections* (New York: John Wiley and Sons, 1984), pp. 269-276. For a contrary view, see H. Abadinsky, *Probation and Parole: Theory and Practice* (Englewood Cliffs, NJ: Prentice Hall, Inc., 1982), pp. 341-344 .

A related view is that the connection should be broken between the decision to release and the provision of post-release assistance. That is, an offender who is in need of post-release assistance and controls should receive them regardless of whether or not he is paroled, and an offender who is paroled but is in no need of assistance or controls should not be subject to them. (It was partly in response to the former aspect that the federal government introduced mandatory supervision in 1970).[7] A less common view, held by fewer modern-day critics, is that post-release supervision has no impact on behaviour, and could be eliminated.

Some critics hold yet another view, that any period of extended incarceration (however defined) should be followed by a transitional period of supervision in the community after release, regardless of the authority under which the offender was released. In foreign jurisdictions, this is sometimes referred to as a "separate supervision term"; it is specifically imposed by the sentencing judge at the same time as the prison term is imposed.[8] This system thus creates a post-release supervision period even for cases where there is no early release granted prior to the expiration of the carceral sentence.

1 **Should reintegration continue to be an objective of conditional release? If so, how should this objective be pursued, i.e., through post-release supervision programs only, through normal pre-release planning, or through an approach like "contract parole"?**

2 **Should offenders be subject to programs of post-release supervision on the basis of:**

- **the assumption that any extended period of incarceration (however defined) should be followed by a transitional period of supervision in the community? or**
- **offenders' needs for and likelihood of benefiting from supervision programs? or**
- **whether or not they have received grants of parole?**

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[7] Mandatory Supervision is discussed on pages 39-40 of this Working Paper and referred to in *Appendix B*. For a comprehensive discussion of this topic the reader is referred to the Report of the Committee on Mandatory Supervision, *Mandatory Supervision: A Discussion Paper* (Ottawa: Solicitor General of Canada, March 1981).

[8] Section 663(l)(b) of the *Criminal Code of Canada* provides for the order of a term of probation (with its attendant supervision) of up to three years after a term of imprisonment for two years or less. In Canada, no statutory provision permits the ordering of an additional supervisory period for longer periods of incarceration. Examples exist elsewhere, however; in California, following the abolition of the parole release function, separate supervision terms were introduced in order to ensure a period of post-release supervision in the community.

PROTECTION OF THE PUBLIC THROUGH THE ASSESSMENT OF RISK OVER TIME

We have seen that the *Parole Act* requires consideration of whether the offender is an "undue risk" in the decision regarding a grant of parole. Risk is also a constant factor considered by correctional authorities in any decision which could affect the public. Thus, any decision to grant a release - temporary absence, day parole, or full parole - will involve the assessment of the risk to society posed by the offender.

The only program connected to early release which does not directly involve an assessment of risk to the public is earned remission for good behaviour in the institution. Institutional behaviour is not a reliable predictor of behaviour in the community: some model prisoners are a threat to the community, and some individuals who are disruptive in a prison environment present little or no risk of reoffending. Nonetheless, once an offender's time served in the institution, plus his/her earned remission (which may be up to a maximum of one-third of the sentence) equals the sentence, the inmate must by law be released, unless (in the federal system only) he or she is judged by the National Parole Board to represent a serious threat to public safety. In the provincial systems, offenders are not subject to supervision after release; in the federal system, they are mandatorily subject to supervision after release, unless they are detained as a threat to public safety. Release via remission is probably the most controversial aspect of conditional release in the minds of the general public.

Risk assessment is the major preoccupation of parole boards in Canada and elsewhere, although boards may also consider other factors. No offender who is considered a serious risk to public safety will be granted parole, and an offender who is considered to be a good risk is extremely likely to be paroled, even if other factors (such as a poor institutional record) are present.

Nonetheless, the risk assessment objective of parole is controversial. Some critics argue that, even though the success rate of paroled offenders is extremely good, errors are inevitable, and the existence of parole therefore creates unnecessary risks to the public. Others argue that when both types of possible errors are considered - errors of paroling people who then recidivate and errors of not paroling people who do not eventually recidivate - the accuracy of parole prediction seems far less impressive.[9]

Still other critics question the value of a prediction-based system which merely delays the eventual return of the offender to the community. This view is countered by the assertion that release programs not only assess risk, they attempt to manage it in the community by such techniques as graduated reintegration of offenders through various stages, ranging from the highly structured environment of prison, to the controlled conditions of a halfway house, eventually to a point where offenders are exercising more and more responsibility for key decisions in their lives.

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[9] For a discussion of accuracy of prediction in risk assessment in parole decision-making, see the *Conditional Release Study*, *supra*, note 4, pp. 106-109; J. Nuffield, *Parole Decision-Making in Canada: Research Towards Decision Guidelines* (Ottawa: Solicitor General Canada, 1982); I. Shewan, "The Decision to Parole: Balancing the Rehabilitation of the Offender with the Protection of the Public", (July 1985), 27 *Canadian Journal of Criminology* 327; J. Hackler and L. Gauld, "Parole and the Violent Offender", (1981), 23 *Canadian Journal of Criminology* 407; and P.B. Hoffman, *Parole Selection: A Balance of Two Types of Errors* (Davis, Calif.: National Council on Crime and Delinquency, 1972).

It is also argued that the sentencing judge has already made an assessment of the offender's risk in fixing the sentence, and that parole is a duplication of the sentencing function in this respect. (This argument assumes that the risk presented by most or all offenders does not change over time, an assumption which does not hold up in all cases.) Another view is that, far from giving a "break" to less risky offenders, parole has the overall effect of increasing the amount of time served by all offenders, because sentence lengths "allow for" the existence of parole (and remission). Support for this view comes from a recent study in the U.S. which found that sentence lengths are 40-50% lower in those states which have abolished the parole decision-making function. A few states which have abolished parole have, however, felt compelled by severe overcrowding to re-establish parole as a safety valve on prison populations.[10]

3 **Should we continue to have a system of conditional release which has the authority to release offenders prior to sentence expiry if they are considered not to be a risk (however defined) to the public? Should risk be the predominant consideration in a release decision? What weight should be given to it, in relation to other factors? (Possible other factors are still to be discussed.)**

4 **How should "risk to the public" be defined? Should this definition appear in law or in administrative policy?**

HUMANITARIAN PURPOSES

Some would argue that conditional release can and should pursue aims which are rooted in its early beginnings in clemency for deserving offenders.[11] Temporary absences may be granted for "humanitarian" purposes, such as to allow an inmate to attend a family funeral. Beyond temporary absences, however, the only forms of release which formally permit the consideration of humanitarian concerns are "parole by exception"[12] and executive clemency, both of which are used very rarely. (Of course, it can be argued that there is a humanitarian aspect in any release prior to the end of a sentence, but mercy is not one of the statutory or even informal goals of release).

Parole by exception - so called because it occurs prior to the usual parole eligibility date - can at present only be granted in circumstances where inmates are terminally ill, subject to deportation, or where their continued incarceration would likely result in serious physical or mental harm.

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[10] U.S. Department of Justice, *Felony Sentencing in 19 Local Jurisdictions: Special Report of the Bureau of Justice Statistics* (Washington: USGPO, 1985).

[11] "Clemency" is provided for in the *Criminal Code* by section 683 (pardons), s.685 (remissions) and s.686 (Royal Prerogative of Mercy). These remedies are available only in exceptional circumstances. (Pardons after sentence has been served are more readily available in certain circumstances pursuant to the *Criminal Records Act*, R.S.C. 1970, Chap.12 (1st Supp.) as amended). For a discussion of issues related to clemency, see Clemency Review Project Team, *Clemency Review: Issues Paper* (Ottawa: Ministry of the Solicitor General Canada, 1981).

[12] "Parole by exception" is provided for by s.11.1 of the *Parole Regulations* and may he granted to inmates who are not members of ineligible categories, where inmates are terminally ill, where their physical or mental health is likely to suffer serious damage if they continue to he held in confinement, or where there have been deportation orders made against them. The procedure is only used in rare cases. See also *Conditional Release Study*, *supra*, note 4, p.69.

All the other criteria for a grant of parole, particularly that the inmate is not an undue risk, must also be fulfilled for a grant of parole by exception. Clemency is by law and tradition not restricted by fixed criteria, but is also a rarity.

Some of the provinces, as well as other commentators, have argued that the criteria for exceptional, humanitarian release should be broadened. Among some of the circumstances which it has been suggested should permit an exceptional early release are: the offender has lost the will to live, and is trying actively or passively to commit suicide; the inmate has performed an extraordinary act of bravery or humaneness, such as saving a life during a riot; the offender has been transferred back to Canada after receiving a foreign sentence which is considered disproportionate to the offence and much more severe than he or she would have received in Canada; in the light of new facts which were not before the sentencing court, or a change in circumstances, the sentence is unduly harsh, or imposes an excessive hardship; the offender has completed a program recommended by the sentencing judge or has satisfied specific objectives of the sentence expressly stated by the sentencing court.

For many readers, whether these types of releases are defensible will depend on whether they are granted on an exceptional basis or whether they are granted on a more frequent basis. Currently, they are handled on a very exceptional basis, through the highly limited "parole by exception" power, through executive clemency, or through a very restricted use of the temporary absence power.

5 **Should there be an authority to release offenders for certain humanitarian purposes, provided there is no undue risk to the public?**

6 **What mechanisms should be in place to ensure that this authority is used sparingly but equitably?**

We turn now to the functions of conditional release which are not in any way part of the statutory objectives of release. Rather, these are what the *Solicitor General's Study of Conditional Release* (1981) called "by-products" of the operation of conditional release according to law.

MITIGATION OF SENTENCE DISPARITY

The *Solicitor General's Study of Conditional Release* found that federal "parolees have considerably longer sentences, on average, for the same offences, than do mandatory supervision cases [i.e., those refused parole]. This suggests that parole has a rather marked effect in evening out differences which might otherwise have occurred in time served as a result of variations in sentencing." The *Release Study* called this a "sentence equalization" effect, an unconscious and unintended lessening of the differences between sentences imposed for the same offence.[13]

Some critics have in fact proposed that parole be formally established as a means of reducing disparities in sentencing, a proposal not endorsed by any of Canada's own parole boards. Some commentators suggest however that it would be much more difficult to get the sentencing judges in a given area to agree upon and adhere to sentence guidelines than it is to establish and monitor a single parole board to even out disparities in sentencing.

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[13] *Conditional Release Study*, *supra*, note 4, pp. 36-41, esp. P.39.

Canada's sentencing processes are, of course, currently under scrutiny by the *Canadian Sentencing Commission*, a Royal Commission created to advise the government as part of the Criminal Law Review process.[14] Should the Commission make proposals designed to impact on the consistency of sentences imposed, such reforms would render any discussion of parole's role in "sentence equalization" less pressing, if not irrelevant.

7 **Should conditional release authorities be permitted to consider, in the decision to grant or deny parole, the length of an offender's sentence, relative to the offence committed?**

8 **From the reverse standpoint, should release authorities be permitted to deny parole to an inmate who meets the other criteria for parole, simply because they feel he or she has not served enough time for the offence?**

REDUCTION OF TIME SERVED AND PENITENTIARY POPULATIONS

As suggested above, this is one of the more controversial aspects of conditional release: that it appears to mitigate the full punishment implied in the sentence. Thus, "six years does not mean six years", but normally four (if remission is earned in full), or two (if full parole is granted at the time of first eligibility). Of course, it is well recognized in Canadian jurisprudence and by individual judges that the service of a sentence of six years will be affected by the operation of correctional processes such as remission, temporary absence, parole, and transfers from one type of institution to another. The offender is, in this sense, committed to correctional authority for a period of six years, and correctional officials are empowered, within numerous legal constraints, to make decisions about where and under what conditions the time will be served.

However, the public perception persists that these processes constitute a mitigation of what the judge intended by the sentence. It is felt that offenders thereby receive less than the deserved or proper punishment, and that the operation of these correctional processes decreases the deterrent effect of the sentence, both for the individual offender affected, and for other potential offenders as well. Others feel that this function constitutes an "interference" with the court's sentence. This view contrasts with the apparent preferences of many Canadian judges, who because of their professional training are not comfortable with or interested in making precise assessments of how a sentence should be administered. These assessments are often felt by judges to be best left to the "experts" - or if there are no real experts in predicting violence or assessing an offender's progress, at least best left to those who have an opportunity to observe offenders on a regular basis.

It is not possible to estimate with any precision just how much effect remission and parole have on the size and growth of institutional populations. It is normally assumed that without these processes, there would be an explosion of prison and penitentiary populations, with consequent financial and human costs. It is assumed by other critics that the elimination of remission and parole would bring a compensating decrease in average sentence lengths.

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[14] The Canadian Sentencing Commission was established by the Government of Canada in 1984 to consider issues related to criminal sentencing in Canada, including the development of sentencing guidelines.

Many U.S. states are currently experiencing serious overcrowding in their penal institutions. In response, some of them have turned to conditional release as a means of coping. Among the methods used are reducing, by law or by other means, the minimum periods which must be served prior to eligibility for release, and making greater use of the executive clemency power.

9 **Should releasing authorities be permitted to consider institutional overcrowding in their decisions about when and whether to grant release? Should early release be used as a means of relieving institutional overcrowding?**

REWARD FOR GOOD BEHAVIOUR WHILE INCARCERATED

Certain conditional releases contribute to the management and control of correctional institutions, although that may not be their primary purpose. Temporary absences may be denied to offenders who have violated institutional rules, and thus the availability of temporary absences to well-behaved offenders serves institutional management ends. Remission is directed at controlling inmates' behaviour in penitentiary by granting them time off their sentence for acceptable conduct and program participation.

Surveys of correctional administrators suggest that institutional personnel rarely report that remission (or "good time", as it is known in many jurisdictions) is a particularly effective incentive to institutional program participation or good behaviour. Rather, they report that remission is "slightly effective" for such purposes, and less effective than other disciplinary tools, such as loss of privileges and solitary confinement.[15] However, correctional administrators will rarely endorse the elimination of remission, largely (it would appear) because they fear the effects of such a move on the growth of institutional populations. A system such as the Law Reform Commission's suggestion for presumptive release at the two-thirds mark in the sentence, but without the need for remission, might satisfy administrators who are concerned about prison overcrowding but not convinced of the value of remission.[16]

Other criticisms of remission exist. A school of thought prevalent in many European countries is that remission is dysfunctional: it makes for good prisoners, not good citizens, and obscures - at least to some extent - the behavioural problems of prisoners which the correctional system ought to be identifying and trying to correct. In this view, it is better to let a "blow-up" occur in the institution, where it can he contained and perhaps treated, than in the community, where the public may be in danger.

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[15] See S. Wormith, *Earned Remission in Canada: An Analysis of Historical Trends and a Survey of Management Opinions* [User Report 4 1986-35] (Ottawa: Solicitor General Canada, Programs Branch (Research Division), 1986) and R.R. Ross and T. Barker, *Incentives and Disincentives: A Review of Prison Remission Systems* [User Report 4 1986-33] (Ottawa Solicitor General Canada, Programs Branch (Research Division), 1986).

[16] Law Reform Commission of Canada, *Imprisonment and Release*, [Working Paper #11] (Ottawa: Supply and Services, 1975), p. 33.

Remission also adds immeasurably to the difficulties of sentence calculation, and perhaps more than any other factor, leads to inaccuracies and inequities in time served.[17] Many criminal lawyers would support its abolition on these grounds alone.

Both correctional officials and the public consider remission to be at least to some extent "automatic" - that is, it is earned in full or almost in full by most offenders. As has been suggested, this leads to a certain undermining of public confidence in a justice system which "automatically" releases offenders before their sentences expire, regardless of what they have done in prison or what they might do after release.

As a result of this criticism of the "automatic" release aspects of remission, Parliament has recently approved amendments to federal legislation which will prevent the release prior to warrant expiry of federal offenders who are considered dangerous, regardless of any remission which they may have earned. The determination of which offenders are considered dangerous will be made by the National Parole Board. Provincial offenders will still be released free and clear at the end of their sentence, less time earned for good behaviour.

10 **Should remission operate as a method of release which is based solely on the offender's behaviour while incarcerated? Or should exceptions be made to remission-based release in the case of offenders considered dangerous, as with the new federal legislation? Or should remission be eliminated as a program which results in early release?**

RECONCILIATION

Reconciliation between victim and offender (such as through restitution paid by the offender to the victim) is rarely a feature of the present release systems in Canada. Although parole boards have on occasion required restitution as a condition of parole (usually in cases of massive theft), there is a reluctance to make such requirements, both because of the difficulty of enforcing restitution conditions and because of doubts about the legality of such orders when not made by the sentencing judge. Some parole boards will consider victim reparation as a condition of parole only when reparation is part of a court order.[18]

Considerations related to the victims of crime will be considered in more depth in another Working Paper for the Correctional Law Review, on *Victims and Corrections*.

11 **Should parole boards be empowered to order community service or restitution to the victim as a condition of paroling an offender, in cases where neither community service nor restitution was ordered by the sentencing court?**

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[17] For further discussion of the problems inherent in sentence calculation, see the Working Paper of the Correctional Law Review, *Sentence Calculation*.

[18] For further discussion of the possible use of victim reparation at parole, see the Correctional Law Review, Working Paper on *Victims and Corrections*. The B.C. Parole Board has adopted policies with respect to victim reparation as a condition of parole.

PART III: KEY ISSUES IN CONDITIONAL RELEASE

In this section, we will turn to a review of the most critical issues facing the programs of conditional release. It is emphasized that this discussion is limited to *key issues* only; the limitations of space and the reader's time prevent an exhaustive review of all issues pertinent to a review of the law of conditional release.

OBJECTIVES OF CONDITIONAL RELEASE

As will be suggested from the previous section, the objectives which can defensibly be pursued by a system of conditional release remain an issue. The criteria for full and day parole contained in the *Parole Act* are, as has been seen, problematic in that they are unclear, vague, apparently outmoded, and provide little real guidance to paroling authorities. Existing administrative policies do not take us much further. In addition, there is some public concern about the apparent functions of some forms of conditional release. Other forms, such as earned remission and mandatory supervision, are highly controversial because of the aims which they serve.

The Correctional Law Review will need to address the objectives and functions of the various forms of release, taken separately and together. As suggested earlier, under "Reintegration", for example, some critics would support a system in which any period of extended incarceration was followed by a transitional period of supervision in the community after release - regardless of how that release occurred (by expiry of the sentence, or by a discretionary decision). Some of the same critics would not support discretionary release, however; they might feel that risk assessment is too inexact a science, or that the sentencing judge has already taken risk into account in setting the sentence. Others might feel that while risk assessment cannot be supported as a criterion for release, humanitarian reasons may sometimes justify a temporary absence from penitentiary, or on an exceptional basis might justify a full release. All of these questions must be addressed holistically and in detail.

VISIBILITY AND ACCOUNTABILITY

Related to the above concern is concern over the transparency or clarity of the conditional release system. Offenders, correctional staff, and members of the bar and general public have frequently complained that release policies are obscure, and have suggested that releasing authorities should be required to give more specific notice of the criteria which will govern releasing and revocation decisions.

This is considered desirable not just on the obvious grounds - which have become more prominent in the post-*Charter of Rights* era - that citizens have a right to know the basis of the decisions being made about their lives by government agencies. It is also desirable because visibility is the *sine qua non* of accountability of various types, including systematic self-evaluation by releasing authorities, accountability to Parliament and to taxpayers, meaningful review by appellate bodies, and the provision of meaningful reasons to the offender as to why he or she was refused parole while his or her cell-mate was not.

This concern about accountability has also been linked to questions about the composition and structure of release authorities, and the type of decision-makers who should be appointed to parole boards. It has been suggested that board members appointed from certain spheres, such as criminology, law and law enforcement, might render decisions which are somehow better than those rendered by persons with no prior knowledge or experience in corrections and related fields. A somewhat contrary view is that board members should be drawn from the community - although it is somewhat difficult to discern precisely who represents the community, or the various communities, served by the criminal justice system.

Equally, there is a constant need to preserve the independence of release decisions from interference from various sources, but at the same time a need to ensure that decisions are in conformity with policy. A properly constituted release authority will be insulated from inappropriate types of interference, but not isolated from government controls in respect of social policy needs and other overall government priorities.

From the correctional manager's point of view, visibility is important because without it, each of the various actors in the system - case preparation staff, community assessment personnel, parole board members, offenders," victims, judges - is operating from an unclear and perhaps different set of assumptions. This leads at the best of times to poor working relationships, and at the worst of times to public concern, delays, lack of job satisfaction, and wrong decisions.

Increasing the visibility of the release system is therefore an issue. Various suggestions have been made for doing so, including public hearings, greater disclosure of case information prior to hearings, articulating clear assumptions, objectives and principles governing release, and establishing highly specific policies or guidelines for decision-making.

THE RELATIONSHIP BETWEEN SENTENCING AND RELEASE

This issue too is related in part to the issue of visibility. It has already been seen that many members of the public are confused and concerned about the impact of release on the sentence of the court. To some extent this is inevitable in a highly complex system of shared discretionary power. However, to the extent that this perception undermines the public credibility of the system, it is worthy of our attention. The sentencing and release systems ought to be, and be seen to be, as integrated as possible - or at least, not in conflict with one another.

From a practical standpoint, the shared responsibility between lawmakers, judges, institutional authorities, and releasing authorities for determining the amount of time ultimately served in prison can create problems. Releasing authorities frequently complain that the true intent of the sentence is often unclear. In setting a sentence of six years, for example, did the judge intend that the offender serve at least one year (prior to day parole), two years (prior to full parole), four years (and be released via remission), or did the judge have no precise notion of what length of time would serve the public interest? Although releasing authorities have the power to release an offender at these various times, they often wonder whether the length of the maximum sentence was meant as a signal that the offender should not be released until much later.

Our present system of sentencing leaves the "true" meaning of the sentence uncertain, in the sense that the amount of time that an offender will serve incarcerated cannot be estimated at the time of sentencing. A prisoner in the provincial system is eligible to be released immediately from a sentence of two years less a day through "back-to-back" temporary absences. Parole and remission both can affect the length of time served, but it is not certain which offenders will benefit, and how - in the federal system, for example, only one inmate in three will receive full parole, and on average after serving more than 40% of the sentence, rather than immediately following eligibility.[19]

Under our present system, a judge will have to give an offender a sentence of at least two years if the offender is to be assured of serving at least six months incarcerated; only a three-year sentence will ensure a stay of one year. This can be clumsy and dysfunctional, especially where the sentencing judge seeks only to ensure retribution for the offence, and does not feel the offender needs to be rehabilitated or incapacitated because he or she is dangerous. In cases where a sentencing judge believes, for example, that a person convicted of theft is no significant risk but should serve sixty days in prison simply as punishment, there is no way in which the judge can ensure that the offender will serve precisely sixty days - not more and not less - because of the operation of remission and parole.

The minimum period which will be served prior to release eligibility is determined by law at a fraction of the sentence imposed. This fraction is fixed, regardless of the individual characteristics of the offender and the offence.[20] erhaps a more flexible system for determining minimum terms should be considered.

One model would be to give judges discretion in setting minimum terms - allowing them to establish minimums at any period up to one-third (or some other fraction) of the sentence, or allowing them the discretion not to impose a minimum term at all. In New York State, where this system was introduced in the new *Penal Law* of 1967, it was found that judges rarely chose to establish a minimum term, leaving that decision instead to correctional authorities.[21] This tends to reinforce the view held by many criminologists that judges are uncomfortable with making the types of assessments required for the ultimate decision as to how much time an offender should serve incarcerated.

A contrasting model is that proposed by the Law Reform Commission of Canada, which suggested that judges be required to state how much time offenders should serve for denunciation (punishment or deterrence) purposes, and how much time (if any) they should serve for incapacitation purposes because they are a threat. Release from the denunciatory portion of the sentence would be presumptive at the two-thirds mark, in order to assist in the difficult transition from prison to the community; release could be ordered at an earlier point only by a court. Release from the incapacitative portion of the sentence could be granted at any time that correctional authorities were convinced that release would not present a "threat to the life and security of others".[22]

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[19] *Supra*, note 4, pp. 39-40.

[20] While most offenders become eligible for full parole after serving one-third of their sentences, some offences require a longer time to he served prior to parole eligibility. Details are set out in sections 5-8 of the *Parole Regulations*, SOR/78-428 as amended.

[21] See, for example, J.E. Nuffield, *The Allocation of Sentencing Power in New York State, 1964-70*, unpublished doctoral dissertation, School of Criminal Justice, State University of New York at Albany, New York, 1978, pp. 186-188.

[22] *Supra*, note 16.

There are, in fact, numerous models which have been proposed for creating a greater appearance and reality of integration between the sentencing and release systems. Possibly the least drastic and most obvious of these is that, where a release occurs through operation of an authority other than a sentencing court, there should be a requirement to give reasons for the release, together with the gist of the information on which it was based. This would lend a greater transparency to releases.

FEDERAL-PROVINCIAL-TERRITORIAL ISSUES

Appendix B contains, for the reader who is less familiar with Canadian system of conditional release, a description of the split in jurisdiction in release powers between the federal, provincial and territorial governments. Suffice it to say here that the split in jurisdiction is complex in the extreme.

What emerges, from a legal point of view, from this split are certain marked differences in entitlements and authorities between the federal and provincial or territorial governments, and thus between offenders who are serving longer sentences (two years or more) and offenders who are serving shorter sentences (less than two years). These differences in themselves may be a concern, in that they may not survive a legal challenge under the equality provisions of the *Charter of Rights and Freedoms*, although the courts may find that certain differences between the two systems are justifiable, in the light of the different types of offenders incarcerated in the two systems.

The following are the most significant differences in these entitlements:

- all federal offenders who do not waive parole consideration are granted a hearing before those parole board members who will decide whether parole will be granted; up until recently, in those seven provinces and the territories where there is no local parole authority, the offender was not granted a hearing. The National Parole Board has just decided to provide hearings in these provincial cases;

- federal offenders are not eligible for temporary absences until they have served (typically) one-sixth of their sentence, and in any case not less than six months; provincial offenders are eligible for temporary absences immediately after sentencing;

- federal offenders may not spend more than 72 hours per month out of the institution on temporary absences; provincial prisoners are limited to 15 days per absence, but in most provinces at least some prisoners will receive "back-to-back" temporary absences which effectively bring about full release into the community;

- federal inmates will automatically be considered for parole at the one-third mark (typically) in the sentence, unless they waive it; in those seven provinces and the territories where there is no local parole authority, prisoners must apply for parole if they wish to be considered;

- provincial offenders who are released as a result of remission are free of any further obligation in respect of their sentences; federal offenders who are released as a result of remission are subject to supervision and possible return to penitentiary after release for a period equivalent to their earned remission.

Some of these aspects are an irritant to provincial and territorial authorities. The 15-day limit on temporary absences at the provincial level is established through the federal *Prisons and Reformatories Act*, and many of the provinces would prefer to see the provision removed rather than have to constantly re-issue temporary absence passes of 15 days each. Also, in the past, some provinces have complained about delays in the process whereby the National Parole Board grants parole to provincial prisoners, but these delays may have been largely or entirely alleviated through recent administrative improvements; the lack of a hearing up until now for provincial prisoners is also considered unacceptable by both federal and provincial authorities. Some of the provinces have objected to the federal government's supervision of remission-released offenders, on the grounds that this puts pressure on them to supervise provincial offenders released because of remission; none of the provinces has any interest in supervising remission-released offenders.

Underlying these differences and irritants is, of course, the split in jurisdiction in release. Like the overall split in jurisdiction in corrections, it is of long standing and, because of this long history and the differing views among the various parties about the best alternative, it may not be susceptible to change in the foreseeable future. The *Nielsen Task Force Study Team on the Justice System* proposed that the releasing authority, like the overall administration of corrections, eventually devolve to the provinces.[23] Without substantial support in the provinces for this option, it is unlikely to receive much attention, despite the *Study Team's* view that not all provinces need opt into devolution.

VIOLENT RECIDIVISM AMONG RELEASED OFFENDERS

This is undoubtedly the chief concern, among members of the public, about the operation of conditional release. A 1982 survey suggested that Canadians believe that more than half the offenders released from penal institutions commit a violent crime shortly after release; in fact only a small minority do. There is little question, however, that public support for conditional release would be stronger were it not for the impression that released offenders are a largely violent group.[24] The public concern about conditional release in this regard is also caught up in, and intermingled with, the public's concern about the lengths of sentences imposed for violent crimes.

Even if it were possible to predict violent recidivism with accuracy, corrections would still face criticism over the release of violent offenders via remission. In the past few years, public concern has focused first on mandatory supervision, and then on earned remission, as a "cause" of violent crime. Correctional systems have argued (without much success, especially at the federal level, where a higher proportion of offenders are serious or hard-core offenders) that to eliminate remission would only delay the eventual problem. For the public, however, "the law is an ass" when it automatically releases offenders who are considered to be dangerous, simply because they have behaved acceptably in the institution. It is for this reason that the federal government has just made legislative amendments, as noted earlier, which permit the detention until warrant expiry of federal offenders who are considered dangerous.

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[23] A Study Team Report to the Ministerial Task Force on Program Review, *Improved Program Delivery: Justice System* (Ottawa: Ministry of Supply and Services Canada, 1986), pp. 15 & 332.

[24] T. Doob and J. Roberts, *Crime: Some Views of the Canadian Public* (Ottawa: Department of Justice, 1982).

It remains to be seen whether these amendments will be sufficient to reassure the public about violent recidivism. Some critics have suggested that all offenders convicted of certain types of crimes (primarily violent ones) should by law be ineligible for any form of conditional release. Opponents of this view argue that the crime of conviction is not a good predictor of an offender's future risk, and that such a mechanistic approach would actually result in arbitrary and inequitable treatment.

COSTS AND USE OF INCARCERATION

The *Nielsen Task Force Study Team*, like many before it, also concluded that Canada makes excessive use of imprisonment as a criminal sanction, with the consequence that Canadians pay a very high price for correctional operations.[25] For example, Canada's incarceration rate is half that of the U.S., but our violent crime rate is only one-fifth that of the U.S. At present, several correctional jurisdictions in Canada are experiencing institutional overcrowding at levels which are higher than have been seen for some time. Fiscal restraint has slowed down or halted new construction in many areas, with the result that without innovative approaches, the same or increased levels of overcrowding can be expected for some time to come.

While demonstrably dangerous offenders receive the severest intervention possible, it is now felt by many correctional administrators that non-violent offenders should, as far as possible and consistent with their behaviour, be handled in the community.

For conditional release, this has meant, in many U.S. states for example, that concentrated efforts are made to identify non-violent offenders early in the sentence and to prepare release plans which will satisfy the requirements of the sentence and any other relevant considerations while allowing the earliest possible release into the community,[26] perhaps with some form of alternative or additional program, such as victim reparation. In Canada, these efforts have been halting at best, probably because our overcrowding problems have not as yet reached crisis proportions. The federal government is currently studying possible approaches, but the role to be played by conditional release authorities in this process has yet to be determined.

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[25] *Supra*, note 23, p. 288.

[26] See *supra*, note 6, as well as D.F. Brookhart, J.B. Ruork, and D.F. Scoven, "A Strategy for the Prediction of Work Release Success," Chap. 35 in R.M. Carter et al, *supra*, note 6, pp. 335-341; D.M. Gottfredson, C.A. Cosgrove, L.T. Wilkins, J. Wallerstein, and C. Rauh, *Classification for Parole Decision Policy* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1978); R.C. Nicholson, "Use of Prediction on Caseload Management," (December 1968), 32(4) Federal Probation 54; and California Department of Corrections, *Validity of the Base Expectancy Scale, BE 61A* (Sacramento, Calif.: CDC, Research Services Unit, 1974).

PROCEDURAL SAFEGUARDS IN CONDITIONAL RELEASE

A number of alleged shortcomings in the existing procedural safeguards, contained in law and practice, governing the decisions and operations of conditional release have been identified by offenders and others. These include:

- the lack, up until recently, of hearings for parole provided to provincial offenders in the seven provinces and the territories, which are served by the National Parole Board;
- the other differences, noted above, between federal and provincial offenders in respect of certain entitlements and programs of conditional release;
- the absence, noted above, of precise criteria for conditional release decisions;
- the need for greater sharing, in writing prior to hearings, of information available to releasing authorities about the offender;
- the possibility of public hearings which would permit the attendance of victims or their families at parole hearings;
- the need for sentencing courts to transmit to parole authorities all relevant information about the case, including the judge's reasons for sentence, the victim impact statement (if any), and the submissions as to sentence made by defence, Crown and victims;
- the lack of formal process attending some temporary absence decisions;
- the need for expanded review or appeal mechanisms from release decisions;
- delays (not inherent in necessary procedures and safeguards) in scheduling revocation hearings for offenders suspended from conditional release status;
- questions about the proper grounds for revocation of release;
- the suggestion that hearings should be (or perhaps are, and should not be) taking on a more adversarial nature.

It is expected that the *Charter of Rights* will eventually result in changes to some of these areas, many of which are the result of a shortage of resources at both the federal and the provincial levels. Corrections may choose a "wait and see" posture in these areas, opting to let the development of case law run its course in due time. The other major course of action available to corrections is to be proactive - as has the NPB with its recent decision to grant hearings to provincial prisoners - rather than awaiting a court decision which may take a form which is less desirable than the policies which may be developed internally by correctional authorities to conform with anticipated *Charter* rulings.

EARNED REMISSION AND MANDATORY SUPERVISION

Finally, one of the most controversial aspects of release for members of the general public is the existence of earned remission and mandatory supervision. The concern over mandatory supervision (MS) is to some extent misplaced, since many members of the public are under the inaccurate impression that the introduction of mandatory supervision in 1970 represented a loosening, not a tightening, of the federal system. In fact, the introduction of mandatory supervision increased the controls over federal offenders by requiring those released via remission to be supervised and subject to possible revocation for the violation of release conditions; prior to 1970, federal offenders were released free and clear at the end of their sentence, less earned remission credits.

Various aspects of the debate over remission and MS will not be repeated in detail here. The issue remains, however, of earned remission itself; some members of the public find it appalling that any offender, regardless of personal characteristics and risk, can be released prior to the end of sentence if he or she has behaved in a reasonably acceptable fashion in the institution. Certainly, this concern is more pronounced in respect of federal offenders who, as a group, are more problematic than provincial offenders; it may be that the public would be more tolerant of remission in provincial systems than in the federal system. There is little question that the issue is still an active one, despite the recent federal legislation permitting detention of federal offenders considered to be a serious threat to society.

Earlier in this paper, a number of options surrounding remission and mandatory supervision were touched on. These include abolishing remission and MS; abolishing remission but creating a presumptive release or a separate post-release supervision period which would provide a controlled transition from the institution to the community; and abolishing MS but retaining remission. Numerous other variants are possible.

12 **The reader has been presented in this Part of the Working Paper with a wide variety of issues to consider in the conditional release area. Which of these are considered a problem, from the reader's own perspective? How would you respond to each of these, or other issues which you consider relevant to conditional release?**

APPENDIX "A"

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

Framework for the Correctional Law Review

Conditional Release

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Victims and Corrections

Native Offenders

Mentally Disordered Offenders

Sentence Computation

Victims and the Correctional Process

The Relationship between Federal and Provincial Correctional Jurisdictions

International Transfer of Offenders

APPENDIX "B"

FEDERAL-PROVINCIAL-TERRITORIAL SPLIT IN JURISDICTION IN CONDITIONAL RELEASE

The *Constitution Act, 1867* provides that the federal government is responsible for "penitentiaries" and the provincial governments for "prisons". The *Criminal Code* provides that persons serving two years or more will be sentenced to penitentiary, while those sentenced to less than two years will normally be sentenced to a prison. As part of their constitutional responsibility for the administration of justice, the provinces also administer all community-based sentences, such as probation.

The conditional release of offenders from penal institutions has generally been held to flow from the federal criminal law power. The federal *Parole Act* creates the National Parole Board, a federal decision-making body, and empowers the provinces to establish parole boards to exercise parole jurisdiction in respect of inmates detained in provincial prisons, with certain exceptions relating to offenders serving extremely long sentences. Three provinces (Ontario, British Columbia and Quebec) have in fact opted to create their own parole boards to make parole decisions about their provincial prisoners. In the seven remaining provinces and the territories, the National Parole Board is the paroling authority.

The three provinces which operate their own parole boards also operate their own parole supervision services to provide control and assistance to provincial offenders after they are released from prison. In the federal system, in the seven remaining provinces, and in the territories, the federal government provides for the supervision of provincial, territorial and federal parolees. Exchange of service agreements between the governments can, however, allow one government to contract with another to provide parole supervision to its offenders in certain areas.

The *Regulations* made pursuant to the *Parole Act* determine, for offenders under both federal and provincial parole jurisdiction, the times at which the offender will become eligible for parole. They also require parole authorities to give reasons for decisions to the offender and direct the minimum number of votes which must be cast in making various decisions.

Remission, which can result in release before sentence expiry, is created in the federal *Penitentiary Act* and *Prisons and Reformatories Act*. These *Acts* provide that an offender in either penitentiary or prison "may be credited with fifteen days of remission of his sentence in respect of each month and with a number of days calculated on a *pro rata* basis in respect of each incomplete month during which he applied himself industriously". Remission is administered at each level of government in respect of its own institutions, according to rules established by each jurisdiction.

In the provincial systems, offenders who are released as a result of remission are no longer subject to correctional authority or supervision, and their sentences are deemed to be completed. In the federal system, offenders who are released as a result of remission are subject to supervision in the community, and may be returned to penitentiary for a breach of the conditions of release, or for suspected criminal activity. In addition, federal offenders may be refused release via remission, in spite of having accumulated earned remission credits, if they are considered by the National Parole Board to be a "serious threat" to society.

Temporary absences are created, in respect of provincial prisoners, in the federal *Prisons and Reformatories Act*, and in respect of federal inmates, in the *Penitentiary Act* and *Parole Act*. The federal system does not permit unescorted temporary absences prior to the service of an absolute minimum of six months incarceration; the provincial systems have no such restrictions. The legislation limits temporary absences to fifteen days, but in practice some provinces grant "back-to-back" temporary absences which in effect extend beyond fifteen days.

APPENDIX "C"

STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

VICTIMS AND CORRECTIONS

Correctional Law Review
Working Paper No. 4,

October 1987

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the *Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons & Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after-care agencies, victims' groups, an employee's organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this second round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the context of competing interests and rights in which victims' suggestions for correctional reforms are considered. Notes the historical decline in the role of the victim in the criminal justice system, against which the victims' movement has evolved, and summarizes recent developments.

Outlines effects of victimization and identifies the needs of victims.

PART I

Discusses how general information about the correctional system can best be communicated to victims.

Explores the case-specific informational needs of victims; examines the present policies regarding the release of information about offenders to victims; and identifies considerations (including operational difficulties, and possible solutions) which should be taken into account if access to information about offenders is to be expanded legislatively.

Recommends that correctional decisions be made on full, complete, relevant information (including victim impact statements (VIS)) provided by the sentencing court.

PART II

Describes a range of correctional programs of benefit to victims (or surrogate victims) where offenders have been imprisoned. The paper identifies recent trends in federal corrections which seem to support reconciliation and recommends that such reparative activities be maintained and encouraged when offenders have been incarcerated.

Discusses the philosophy of reconciliation and considers the implications of adding it to the statement of Correctional Philosophy.

Considers the implications of expanding the mandate of corrections to include the provision of corrections-related supportive services and programs for victims of crime.

Explores suggestions for deducting restitution payments from inmate pay and identifies the legal and practical impediments to so doing.

PART III

Considers victims' suggestions and other options for increasing relevant victim input in the parole process, including the possibility of opening parole hearings to the public. The paper reviews present policies and explores options for expanding victim involvement in the parole process in the context of meeting the victim's "need to know" about the offender, and reviews issues related to presentation to parole decision makers of victim-related information and opinion.

Favours permitting written VIS to be submitted or updated to ensure that adequate information is before decision-making authorities, but declines to recommend participation of victims at hearings.

Suggests that changes to the parole process should promote good decisions in the first instance, with internal procedures to review those decisions, rather than setting up outside review mechanisms.

Discusses the composition of parole boards, including the recruitment of "community members".

SUMMARY

Affirms the appropriateness of corrections exploring ways of responding creatively and effectively to the needs of victims.

Acknowledges the controversy surrounding, and the emotional impacts on all of us of, victim suggestions for correctional reform.

Challenges respondents to propose the appropriate balance of competing victim and offender interests in responding to the issues raised in the paper.

Note

NOT ALL ISSUES RAISED BY VICTIMS ARE DISCUSSED IN THIS PAPER. SOME, SUCH AS MANY GENERAL CONCERNS ABOUT PAROLE, ARE DISCUSSED IN OTHER WORKING PAPERS. GENERALLY, ONLY THOSE ISSUES WHICH ARE CLEARLY AND SPECIFICALLY LINKED TO THE SPECIAL NEEDS OF VICTIMS ARE ADDRESSED. FURTHERMORE, QUESTIONS FOCUS ON THE APPROPRIATENESS OF DEALING WITH THESE ISSUES IN LAW OR POLICY, SINCE THE CORRECTIONAL LAW REVIEW IS A REVIEW OF FEDERAL LEGISLATION GOVERNING CORRECTIONS. THUS, QUESTIONS RELATED TO PROGRAM DESIGN, FOR EXAMPLE, OR FUNDING FOR VICTIM-RELATED PROGRAMS, ARE NOT DEALT WITH HERE IN ANY DETAIL.

INTRODUCTION

Although victims or their families played a prominent role in resolving criminal disputes in ancient societies, the state gradually replaced the victim as "the central actor" in the criminal justice system[1] In recent years, it has been recognized that the fact that the victim's part in the process steadily lessened over time does not justify the lack of a formal place for victims today, and all areas of the criminal justice system have been challenged to review the role of victims.

Generally, victims have been excluded from key correctional - and other criminal justice system - decisions, to which they believe they have something to contribute. They may be denied access to information about specific offenders, and often find it hard to get general information about the correctional system. Increased recognition of the needs and interests of victims, as well as the Federal Government's commitment to addressing the needs of victims of crime, makes consideration of the role of victims by the Correctional Law Review both appropriate and timely.

Proposals for correctional reform responsive to victims are controversial and have an emotional impact on all of us. In this paper we will examine these proposals and our assumptions about corrections and offenders in keeping with earlier proposals in the paper on *Correctional Philosophy*, seeking to balance the competing interests and rights of all people who will be affected by the outcome.

Obviously not all victims' needs and concerns can be responded to by corrections: many arise at a time prior to the imposition of sentence, while others may be wholly or in part outside the mandate of federal corrections. This paper explores possible avenues for responding to victim concerns in the federal correctional sphere where it is possible and reasonable to do so without unduly intruding on the legitimate rights of offenders. In particular we may expect corrections to respond where doing so prevents further victimization by the criminal justice system, where victims' needs can only be, or can best be, met by corrections, or where meeting the needs of victims will also further the objectives of corrections.

OUTLINE OF RECENT DEVELOPMENTS

Since the 1970's, interest in the role of the victim in the criminal justice system has increased. Many factors - often complex and interrelated - contributed to this development; some of the more obvious ones are worth identifying. The international victimology symposia held in that decade began to focus more on research related to victim trauma, victim needs and the role of the victim in the criminal justice process than on its traditional preoccupation with the role of the victim in the offence and his or her relationship with the offender.

At the same time, community interest in child abuse, especially child sexual abuse, increased. The growing prominence of the women's movement, and its articulated concerns about victims of spousal abuse and sexual assault, contributed to a rapid expansion of services for these particular victims. Surviving family members and victims of both impaired drivers and violent crime, angered by what they perceived to be their further victimization at the hands of the criminal justice system, began to develop small self-help and advocacy groups in various parts of the country. These groups have received assistance and encouragement from a wide range of intermediaries concerned about the welfare of victims and their families, such as police, victim movement advocates, interested individual politicians and bureaucrats, and academics. Financial assistance from different levels of government has also been increasingly available.

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[1] For a discussion of the historical development of the role of victims, see J. Hagan, *Victims Before the Law: The Organizational Domination of Criminal Law* (Toronto: Butterworth And Co. (Canada) Ltd., 1983).

Court-related victim/witness assistance programs designed to satisfy the emotional and social needs of victims (and witnesses) and to increase their cooperation with police and prosecutors now exist in a number of centres across the country. Through all of these developments, victims have sought to make the criminal justice system more responsive to their needs and concerns.

During this period, governments also established task forces, commissions, committees and working groups to review the needs and concerns of victims, some of which are relevant to the Correctional Law Review.

The Federal-Provincial Task Force on Justice for Victims of crime was established in 1981 to examine the role of the victim in the criminal justice system. The recommendations in its 1983 report focused on the provision of information to victims, the development of victim services, the desirability of giving victims a more prominent role at sentencing through the introduction of victim impact statements, the utilization of existing (or modified) provisions of the *Criminal Code* (compensation for losses, return of property, etc.), and on the special needs of particular victim groups (elderly, children, assaulted wives, sexual assault victims).[2] The Federal-Provincial Working Group on Justice for Victims of Crime, established to assess the implementation of the recommendations of the original Task Force, submitted its report to provincial and federal Ministers of Justice in February 1986.[3] While these reports do not have much to say about corrections per se, the discussion surrounding their recommendations with respect to sentencing and information dissemination are relevant to related issues in the correctional context.

In 1982, the President of the United States created a Task Force on Victims of Crime. Its report, which recommends a constitutional amendment to ensure the right of victims to be present and be heard at all critical stages of judicial proceedings, has had considerable influence on the thinking of victim organizations in Canada, particularly with respect to parole.[4]

The Metropolitan Toronto Task Force on *Public Violence Against Women and Children*, set up in 1982 in response to public concern following a series of brutal crimes in that municipality, assessed the effectiveness of the criminal justice system (including the prosecution of offenders, and the roles of the corrections, probation and parole systems) in deterring violence against women and children. Its 1984 Final Report made many wide-ranging recommendations, directed at municipal, provincial and federal governments, as well as the private sector.[5]

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[2] Canadian Federal-Provincial Task Force, *Justice for Victims of Crime: Report* (Ottawa: Minister of Supply and Services Canada, 1983).

[3] Canadian Federal-Provincial Working Group, *Justice for Victims of Crime: Implementation Report* (Ottawa: Ministry of the Solicitor General Canada, not yet released).

[4] President's Task Force, *Victims of Crime: Final Report* (Washington: Government of USA, December 1982).

[5] Metropolitan Toronto Task Force, *Public Violence Against Women and Children: Final Report* (Toronto: Municipality of Metropolitan Toronto, March 1984).

In May of 1984, the Ontario government sponsored a two-day Consultation on Victims of Violent Crime to study the Federal-Provincial Task Force Report. The resulting report[6] recommended the establishment of victim advocacy mechanisms to assist victims to participate in various criminal justice processes, including corrections and release. While this report was critical of conditional release, the Metro Toronto Report focused on the need to study causes of violence, and to identify, treat or control offenders who have the potential for further violence.

In August 1985, Canada sponsored, at the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, a Declaration of Basic Principles of Justice Relating to Victims of Crime, which it had played a key role in drafting. The Congress recognized the desirability of ensuring more effective measures at the international and national levels on behalf of victims of crime; it resolved to promote progress by all member states in their efforts to respect and to secure for victims the rights due to them. The declaration (see *Appendix B*) was adopted by the UN General Assembly in November 1985.

The declaration states that victims are entitled to access to the mechanisms of justice and to prompt redress (i.e. restitution and compensation) as provided for by national legislation. The resolution urges member countries to ensure that the views and concerns of victims be heard at all appropriate stages of criminal proceedings, to the extent that such participation does not compromise the rights of the accused and is consistent with the nation's criminal justice system. Furthermore, it urges that the criminal justice system strive to avoid unnecessary delay in disposing of cases or granting awards to victims and that restitution and compensation be made available to victims. While Canada has laws and practices in place presently for victims' protection that meet the standards contained in the UN resolution, it is important to review these laws and practices periodically to determine whether they can be further improved and made more responsive to crime victims. The Correctional Law Review provides an opportunity to review those laws and practices related to corrections.

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[6] Consultation on Victims of Violent Crime, *Justice for Victims* (Toronto: Government of Ontario, May 1984).

THE EFFECTS OF VICTIMIZATION AND THE PSYCHOLOGICAL NEEDS OF VICTIMS

It is important to recognize that victims are not a homogeneous group. They may be the victims of robbery, sexual assault, attempted murder, break and enter, or of fraud, vandalism or petty theft. The crime may have been unforeseeable, sudden, arbitrary, or part of a pattern of abuse. The crime may have been committed by a stranger or by a neighbour, employer or employee, spouse or other family member. The family of the actual victim may also suffer because of the offence. Clearly individual victims will respond in different ways, and will require different things to recover from the experience of victimization.

The effect of crime on victims may vary from mild shock, or a feeling of moral indignation, to long-term physical and psychological trauma which may spill over into every aspect of their lives. Several models of victim response have been advanced to describe the basic intellectual and emotional changes that occur after victimization. All describe symptoms and phases closely linked to the clinical features of post-traumatic stress syndrome.[7] Common to all the models of victim response are feelings of disorganization, fear, numbing, anger, and denial, which occur in alternating fashion.[8] Confidence and self-esteem are lowered, leaving victims more vulnerable and dependent than usual.[9] This may be compounded by secondary psychological trauma if the victim feels rejected by or does not receive expected support from the community (social agencies and the criminal justice system) as well as family and friends.[10]

Victims may require assistance in moving from these responses to the development of strategies for coping and survival.[11] Revenge and retribution are unlikely to heal their psychological wounds; what is needed is a sympathetic and empathetic response from the community toward the victim.[12] Measures which reduce victims' feelings of isolation, aloneness and helplessness will also reduce their secondary psychological trauma.[13]

In coming to terms with their victimization, certain "stages" appear crucial. An acknowledgement that the crime actually happened, and a coming to terms with feelings of mortality, vulnerability and lack of control appear vital if the victim is to be able to put the crime behind him or her, and re-establish control over his or her life.[14]

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[7] Dr. N.C. Andreasen, "Post-traumatic Stress Disorder" in H.I. Kaplan, A.M. Freedman, and B.J. Sadock (eds.), *Comprehensive Textbook of Psychiatry, III*, 3rd edition (Baltimore: Williams and Wilkens, 1980), pp. 1517-1525, cites the DSM III definition of post-traumatic stress syndrome as follows: The essential feature is the development of characteristic symptoms after the experiencing of (a) psychologically traumatic event(s) outside the range of human experience usually considered to be normal. The characteristic symptoms involve re-experiencing the traumatic event, numbing of responsiveness to, or involvement with, the external world, and a variety of other autonomic, dysphonic, or cognitive symptoms (exaggerated startle response, difficulty in concentrating, memory impairment, guilt feelings, and sleep difficulties). The World Federation for Mental Health subscribes to the view that post-traumatic stress syndrome is at the heart of the mental health needs of all types of victims: "Meeting Notes of Scientific Committee on Mental Health Needs of Victims," World Federation for Mental Health, Vancouver, p. 2.

[8] S. Salasin, "Services to Victims: Needs Assessment" in Salasin (ed.), *Evaluating Victim Services* (Beverly Hills: Sage, 1981), pp. 25-29. Salasin reviews the models of M. Symonds ("Victims of Violence: Psychological Effects and After-effects," 1975 (35) *Amer. J. of Psychoanalysis*, p. 24), C.R. Figley and D.H. Sprenkle ("Delayed Stress Response Syndrome: Family Therapy Indications," July 1978, *Journal of Marriage and Family Counselling*), and M. Bard and D. Sangrey (*The Crime Victims' Book* [NY: Basic Books Inc., 19791 pp. 31-47).

[9] M.O. Hyde, *The Rights of the Victims* (Toronto: Franklin Watts, 1983), p. 45.

[10] M. Symonds (1980) "The 'Second Injury' to Victims" in S. Salasin (ed.), [1980, Special Issue] *Evaluation and Change*, pp. 37-38.

[11] World Federation for Mental Health, *supra*, note 7, p.2.

[12] M. Symonds (1975), *supra*, note 8, p.26.

[13] *Ibid*, p. 25.

In this paper we will be looking in more detail at how the correctional system can respond appropriately to victims, but it appears that the following issues have been identified as being important to consider:

1. *Information* about the offender and the offence can contribute to a victim's understanding and eventual acceptance of the crime.

2. *Support* from the community as well as from family and friends is crucial to help the victim deal with feelings of isolation and vulnerability. Community support can be shown through victim assistance and compensation programs, as well as through the helpfulness and concern of criminal justice personnel whose actions can minimize the trauma of participating in the criminal process itself.

3. *Recognition of harm*. It is important to the victim that the criminal justice system recognize the harm done through the imposition of an appropriate penalty. It is also important that the offender recognize, and acknowledge, the harm done to the victim. This is important to assist the victim in coming to terms with the fact of his or her victimization.

4. *Reparation for the harm*, which can include financial compensation or other action by the offender designed to make redress, constitutes a concrete acknowledgement of the harm done, and may also be important to restore the victim's sense of self-worth.

5. *Effective protection* from re-victimization or retaliation is crucial to alleviate the victim's feelings of vulnerability. This is particularly important where victims know and have a continuing relationship with the offender. Some victims articulate their concerns for protection of other members of the public, as well.[15]

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[14] M. Bard and D. Sangrey, *supra*, note 8, pp. 34-35.

[15] Others have identified these elements of victim needs similarly: I. Waller, *The Role of the Victim in Sentencing and Related Issues* (Ottawa: Canadian Sentencing Commission, 1987), pp. 4-7; M. Symonds, *supra*, note 8, p. 26; M.O. Hyde, *supra*, note 9, p. 52; WHO/V&M Working Group on the Psychosocial Consequences of Violence, "Summary and Recommendations," April 6-10, 1981, The Hague, Netherlands, pp. 6-8; Proceedings of the NAACJ Seminar, *Criminal Justice and Victim-Offender-Community Reconciliation* (Ottawa: September 1985), pp. vii; and J. Gittler, "Expanding the Role of the Victim in the Criminal Action: An Overview of Issues and Problems," (1984) 11 *Pepperdine Law Review* 117 at 149.

PART I: INFORMATIONAL CONCERNS OF VICTIMS

Almost every study made of victims has highlighted information as their greatest priority.[16] Victims have a legitimate interest in knowing not only how the criminal justice system operates, about matters related to their own cases and about the perpetrators of crimes against them, but also about any services that may be available to assist them in recovering from their experiences with crime. Victim advocates suggest that keeping victims informed about the status of their cases at pre-correctional stages of the criminal justice process and providing victims with information about particular offenders throughout their involvement with criminal justice systems (including corrections) prevents the sense of being further injured by the process and may contribute to victims' capacities to put the crime behind them.

If victims' informational concerns are addressed, the criminal justice system is more likely to be perceived as relevant and effective, and in turn may expect better cooperation from victims and the public.[17] However, it has been suggested that increased information in the absence of increased participation may only heighten victim frustration with the criminal justice system.

GENERAL INFORMATION

Although general information about the criminal justice system has been increasingly available in recent years, its distribution to victims remains uneven. Victims have had insufficient information about certain aspects of the criminal justice system and about services available to assist them (particularly access to legal advice and the victim compensation funds available in almost all of the provinces to victims of violent crime).[18] The lack of systematic provision of information means that only those victims who happen to hear about victim services will benefit, and those who hear about them too late to apply will feel cheated or neglected.

The Federal-Provincial Task Force on Justice for Victims of Crime recommended that every victim and witness be provided with general information about the criminal justice system, the rights and obligations of victims and witnesses, and the explanation of a subpoena and enforcement of court orders, such as restitution and peace bonds. This information was to be provided in pamphlets prepared jointly by police, prosecutors, and victim service workers, and distributed within each jurisdiction with subpoenae.[19] However, victims and witnesses often report not receiving information, and the Implementation Working Group found that even when information is distributed, it is not always in a form comprehensible to the ordinary person, nor in a manner or form which takes adequate account of the effects of victims' trauma.[20]

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[16] Federal-Provincial Task Force, *supra*, note 2, p.73.

[17] In support of this view, see K.P. Kelly, "Victims' Perceptions of Criminal Justice," 11(1984) *Pepperdine Law Review* 15 at p. 20 and F. Cannavale, *Witness Cooperation* (Washington: Institute for Law and Social Research, 1975), p. 16, who hypothesize that the negative assessments by witnesses and victims contribute to an undercurrent of popular dissatisfaction that is undermining the US public's respect for its court system.

[18] Federal-Provincial Working Group, *supra*, note 3, p. 8. This situation has improved in recent years: more publications are now available. See, for example, Department of Justice, *Sexual Assault ... Your Guide to the Criminal Justice System* (Ottawa: Department of Justice, 1986).

[19] Federal-Provincial Task Force, *supra*, note 2, Recommendation 71.

[20] Federal-Provincial Working Group, *supra*, note 3, pp. 12-13.

Correctional systems across Canada publish general information about their programs, designed for the use of the general public, police, prosecutors and judges. However, as with other general criminal justice pamphlets, those about corrections are not always readily available, nor are they always in a form considered by victims to be useful or meaningful.

A number of options have been suggested to improve the distribution of correctional information. Crown Attorneys could be asked to provide victims with appropriate pamphlets about corrections at the time of plea "consultations" or at the sentencing hearing; however, many cases are disposed of in the absence of the victim. Another option is to have such pamphlets provided to victims by police upon their first contact with the criminal justice system. However, a proliferation of information at this stage could be counterproductive, overburdening both police and victims. A further option is to ensure that pamphlets which are already being distributed by the police contain a reference as to where the victim may obtain information about corrections.

While current activities of the Ministry reflect an acknowledgment that victims and the public at large require better access to general correctional information, we must ask whether this should be formalized:

1 **Should federal law relating to corrections require the dissemination of meaningful information about correctional processes to victims and members of the public generally? If so, should the law require this information to be provided in any particular form? Alternatively, are such matters better left to policy?**

CASE-SPECIFIC INFORMATION

As regards information about their own cases at early stages of the criminal justice process, it is generally agreed that victims should be given information about charges laid, the name of the accused, the date and place of the bail hearing, if applicable, and reasonable notice of dates and locations of court proceedings, including sentencing. The outcome of decisions at each of these stages is also considered to be information to which victims should have access.[21] For the most part, no legal confidentiality attaches to such information; making such information accessible to victims is both a courtesy and a positive action by the state designed to minimize victims' anxieties. Although the complexity of criminal law processes (including changing court dates) contributes to the difficulties in keeping victims informed, very often the problem is that, at present, no one in the criminal justice system is clearly identified as being responsible for providing this information.

The issues related to victim access to case-specific information about offenders who are incarcerated are more problematic. Victims may need information about the offence, the offender, and criminal justice processes in order to make sense of what has happened to them and to re-establish control over their lives. However, there is no defined set of information which all victims require, nor even that which will clearly meet the needs of particular groups of victims. Nor are there mechanisms in place currently to provide such information. Furthermore, there may be a perception of secretiveness which breeds suspicion that criminal justice and correctional authorities are not acting in the best interests of victims or the public.

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[21] Federal-Provincial Task Force, *supra*, note 2, Recommendations 66-68, and pp. 124-125.

There is no consensus as to how much information victims and the general public should be entitled to receive about specific offenders after sentencing. Some victims have requested information about the offender's treatment or involvement in prison programs, the security classification of an inmate, the place of incarceration, the fact of an inmate being unlawfully at large, an inmate's eligibility dates for various forms of release, the inmate's actual release dates, the location to which he or she is released, and the conditions of release. On the other hand, personal information about individuals which is held in federal (and some provincial) government files is normally not released to third parties.

Legislation protecting the privacy of information about individuals must strike a delicate balance between competing interests - in this case, between the interests of victims and the interests and rights of individual offenders. Offenders, like other members of our society, have the right not to be harassed or threatened, nor to have information about them released, particularly that which is highly personal (such as medical or psychological details) and not directly relevant to the legally recognized entitlements of the person making the request.

Respect for privacy is the acknowledgement of respect for human dignity and of the individuality of the person. It is "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is to be communicated to others."[22]

In certain cases, the state compels the individual to provide it with some personal information (for example, people must disclose their income to the federal government so that the amount of income tax they are to pay may be assessed), but generally the scope of disclosure and the purposes for which it may be used are extremely limited (i.e. with a few exceptions, Revenue Canada is not free to disclose that information to anyone else). Even where there may appear to be a socially valid purpose (for example, releasing an address taken from Income Tax records to a spouse who is seeking enforcement of a support order), federal legislators have been reluctant to permit direct access to such information.[23]

Although privacy is not specifically mentioned in the *Charter*, the courts have recognized that a reasonable expectation of privacy is protected by section 7, which entitles people to "security of the person", and by section 8, which prohibits unreasonable search or seizure. However, regardless of whether all claims to privacy are protected by the *Charter*, privacy has been recognized as being fundamental in Canadian society, and privacy of information has been accorded increased legal safeguards and protections.

Since 1983, the release of information by the federal government to any person has been regulated by the *Access to Information* and *Privacy Acts*.[24] Correctional authorities have been reluctant to release information about an offender's treatment, security classification and place of incarceration due to the restrictions set out therein. Section 8(1) of the *Privacy Act* prohibits the disclosure of personal information to third parties except in the circumstances prescribed in section 8(2) of that *Act*. Consistent with this, section 19 of the *Access to Information Act* provides that except in specified circumstances "the head of a government institution shall refuse to disclose any record requested under this *Act* that contains personal information as defined in section 3 of the *Privacy Act*". This is defined as information about an identifiable individual that is recorded in any form including, "... information relating to the education or the medical, criminal or employment history of the individual" and "the address of the individual."

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[22] Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Report of the Standing Committee on the Review of The *Access to Information Act* and the *Privacy Act* (Ottawa: Ministry of Supply and Services, March 1987), p. 58.

[23] Pursuant to *Family Orders and Agreements Enforcement Assistance Act*, S.C. 1984-85-86, Chap. 5, the federal and provincial governments have set up enforcement mechanisms which will permit support enforcement officials, but not spouses, access to governmental information indicating the location of the defaulting spouse.

[24] The *Access to Information Act*, and The *Privacy Act*, are Schedules I and II respectively of Chapter 111, S.C. 1980-81-82-83, as amended. (A number of provinces and territories have similar legislation.) The *Privacy Act* replaces Part IV of the *Canadian Human Rights Act*, S.C. 1976-7, Chap. 33, sections 49-62.

Section 19(2) of the *Access to Information Act* permits disclosure of personal information in three circumstances: a) when the individual to whom it relates consents; b) when the information is publicly available; or c) when the disclosure is in accordance with s.8 of the *Privacy Act*. The provisions in that section related to "consistent use" and "public interest" can be used for limited disclosure of information about inmates to third parties.

"Consistent use" is not defined in the present legislation; it has been interpreted quite broadly by some ministries or agencies and more narrowly by others.[25] Basic factual information about offenders is released to victims (but not the public at large) pursuant to section 8(2)(a) of the *Act* which permits disclosure of personal information "for a use that is consistent with the purpose for which the information was originally obtained." Also, information about escapes is presently released to the public for law enforcement purposes pursuant to this section - regaining custody of an escapee is viewed as a purpose consistent with the administration of the sentence.

Subparagraph 8(2)(m)(i) permits disclosure where "the public interest ... clearly outweighs any invasion of privacy that could result from the disclosure". Disclosures made pursuant to this provision may only be made by senior officials after advising the Privacy Commissioner of the intention to do so. (In emergency situations the Privacy Commissioner may be advised after the information is released). It has been suggested that this special condition for disclosure is being used in ways that may not be totally appropriate,[26] and that individuals should generally be notified of impending disclosures and be entitled to contest them, particularly where the Privacy Commissioner determines such disclosures constitute unwarranted invasions of personal privacy.[27] Corrections officials have preferred the use of s.8(2)(a) to that of 8(2)(m) for the release of information about offenders, since 8(2)(m) was really designed as an exceptional measure.

Within the constraints of current legislation, the government has endeavoured to ensure that accurate information about offenders is released to victims and, in some cases, to the general public. Pursuant to s.8(2)(a) of the *Privacy Act*, present National Parole Board (NPB) policy allows victims or their representatives access to information about release eligibility dates, a decision to release an inmate (including type of release, general reasons for and terms and conditions of release/permits, and number of votes cast), destination of the offender upon release, and general reasons for revocation of an offender's release, where applicable. (Victim groups which request information about the location, treatment, and release of all offenders in their area, or about large numbers of offenders of a certain type, however, are not granted such information. Of course, statistical information about such things as release rates and types of offenders incarcerated or released can be made available to such groups, provided that the information does not identify particular individuals).

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[25] The Privacy Commissioner has expressed some concern about the amount of information which may be changing hands for "consistent use" purposes without strict adherence to the provisions of the *Privacy Act*: Standing Committee, *supra*, note 22, p. 56. It might be defined as any use relevant to the purpose for which it was collected and necessary to the statutory duties of the collecting agency or for it to operate a program specifically authorized by law; its use or disclosure should have a reasonable and direct connection to the purpose(s) for which it was obtained or compiled: ibid, p. 57.

[26] Standing Committee, *supra*, note 22, p. 25

[27] *Ibid*, p. 26.

Correctional Service of Canada (CSC) policy permits the release to victims of three types of information about federal inmates: pursuant to s.69(2) of the *Privacy Act*, some items which are already a matter of public record and could be obtained through other channels (such as name, age, court of conviction, date and length of sentence, nature of current offence, criminal record); pursuant to s.8(2)(a) of the *Act*, limited information which may be of particular importance for the security of the victim (institution from which the inmate is to be, or has been, released - but not place of incarceration otherwise); and some information about release (release eligibility dates, terms and conditions of release appearing on release certificates/permits, actual date and type of release, and destination of the offender upon release). All of this information except some parole related matters may also be released to the general public.

Ontario is taking a slightly different approach to the release of personal information from that of the federal government. Its *Freedom of Information and Privacy Act*[28] would permit the release to third parties of personal information where the individual about whom the information pertains consents to its disclosure, where it has been collected and maintained specifically for the purpose of creating a record available to the general public, where its release is expressly authorized by Ontario or federal statute, where the disclosure is for a purpose consistent with that for which it was obtained or compiled, or where the disclosure does not constitute an unjustified invasion of personal privacy.

In determining the latter, consideration must be given to all the relevant circumstances, including whether the disclosure is desirable for subjecting the activities of the government or its agencies to public scrutiny, whether such access will promote public health and safety, whether the information is highly sensitive or whether the person to whom the information relates will be exposed unfairly to pecuniary or other harm, among other factors. The legislation specifically establishes a number of types of information the release of which can be presumed to constitute an unjustified invasion of personal privacy (e.g. release of medical and psychological records). Furthermore, the person about whom the information has been compiled is entitled to notice of the proposed disclosure, to make representations as to why the information should not be disclosed, and to appeal any decision made to disclose information against his or her wishes. (Similarly, where disclosure is denied, the person requesting the information may also appeal the decision.)

Although the legislation specifically permits the withholding of correctional records from third parties and the individual concerned, Ontario correctional authorities may nonetheless be able to release somewhat more information to victims than may their federal counterparts where the release of such information would not result in any harm to the offender, particularly where its release is provided for by enabling legislation. In all cases, the decision maker must weigh the competing interests.

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[28] The *Freedom of Information and Protection of Privacy Act* was passed by the Ontario Legislature in June 1987.

Present federal legislation contains mandatory and discretionary exceptions to access to personal and governmental information. Such exceptions are "class exemptions" in which a category of records is exemptable because it is deemed that an injury could reasonably be expected to arise if they were disclosed. A "harms" or "injury" test to restrict access to information on a case-by-case basis would require the government institution to demonstrate the kind of harm that could reasonably be expected to occur as a result of disclosure. It suggests that government institutions should be able to withhold records or personal information when disclosure could reasonably be expected to be significantly injurious to a stated interest; otherwise access would not be restricted.[29] Of course, any test which requires a case-by-case analysis of possible harm will be administratively far more cumbersome than a class test.

In considering what modifications might be made to existing federal legislation, we start from the proposition enunciated in the first principle of the proposed correctional philosophy (see *Appendix C*): that an individual under sentence retains all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. This position, which reflects both the common law and the *Charter*, suggests that inmates' rights to privacy should only be interfered with when there is a justifiable reason for doing so. While it is obvious that incarcerated persons cannot be accorded the degree of privacy they would have in a house or private office, nonetheless they retain an expectation of privacy based on what is reasonable in the circumstances. Indeed, the fact that inmates' privacy is already curtailed to such a significant degree by incarceration makes protection of the limited privacy they retain even more important. On the other hand, some people may feel that the importance of responding to the recognized needs of victims may be sufficient to warrant some intrusion into inmates' privacy. Moreover, some would go so far as to suggest there is a "public right to know" about offenders.

Using the criteria of potential harm to the offender which could result from disclosure, it would seem to be reasonable to disclose information about an inmate's place of incarceration, proposed date and area of release and, where relevant, escapes. The release of such information is clearly linked to victims' perceptions of security. Although in practice it is very rare that an offender continues to pose a threat to his or her victim upon release from incarceration, provision of this information will permit those victims to make any changes in their lifestyle they feel are warranted.

It is less clear, however, how the release of information about an offender's treatment, or participation in prison programs, could be related to victims' needs. While release of such information may not pose a risk or harm to the offender, it is potentially of such a personal nature to offend our standards of personal privacy and, in the absence of a significant benefit to the victim, is an unwarranted invasion of the offender's privacy. Nevertheless, making such information available to victims may increase the accountability (or at least the visibility) of correctional and release decision-making.

Since the offender's vulnerability vis-à-vis the release of personal information increases as he or she moves from being an inmate to a parolee, many people would consider it inappropriate to release the address of a parolee. Offenders living in the community are expected to become integrated in and reconciled with the community. While it is desirable that they be accountable for their behaviour (and hence, they are subject to some restrictions to which other people in the community are not), as much as possible, they should receive the same entitlements as others living in the community.

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[29] Standing Committee, *supra*, note 22, p. 20.

Furthermore, correctional authorities wonder whether it is really important, desirable or feasible to advise victims each time a correctional decision is made about an offender. It is important to bear in mind that a great number of decisions are made about each offender during the administration of the sentence. These range from decisions about disciplinary infractions, work placements, treatment, institutional transfers etc., at least some of which may be relatively insignificant to the victim, to those decisions which may be more significant, such as the granting of temporary absences (TAs) and other forms of conditional release. Even TAs vary from those which permit emergency medical assistance - generally escorted and of short duration - to a 3-day unescorted absence in the community. Over the course of a year, a myriad of decisions are made about Canada's 12,000 federal inmates. Simply from an administrative point of view, it is important to reach some consensus as to which decisions victims should have better access.

In reviewing the existing federal legislation on access to information and privacy as it governs the release of information about offenders, the competing interests of a victim's "need to know" and an offender's right to privacy should be balanced. This could be done by taking into account the significance of the privacy interest, any possible harm that release of the information could cause, including serious disruption of the offender's program, and the significance of the "need to know" on the part of the person making the request. (For example, personal medical or psychological records should probably never be disclosed, whereas matters of public record, such as the inmate's conviction and sentence, perhaps always should be). Furthermore, something more than idle curiosity should motivate the request. In the absence of a legitimate connection between a victim's "need to know" and the information sought, the privacy rights of inmates should prevail. Consistent with our position in the *Correctional Authority and Inmate Rights* paper, every effort should be made to provide inmates with as much privacy as possible.

2 **Do you agree with the general principles described above respecting the release of case-specific information to victims? i.e.,**

- **offenders, like other Canadians, have the right not to have personal information about them released unless there is justifiable reason to do so;**
- **victims (and perhaps the general public), on the other hand, have a competing right to obtain case-specific information about offenders under certain circumstances, including a reasonable apprehension of a threat to personal security, the reasonable right of the public to scrutinize the activities of government and its agencies, and the fact that the information may already be a matter of public record and obtainable elsewhere;**
- **in the absence of a clear and legitimate connection between the victim's "need to know' and the information sought, the privacy rights of the offender should prevail;**

- **where there is such a connection, the victim's "need to know" should be balanced against the possibility that release of the information would subject the offender or another person to harm or expose anyone unfairly, would disrupt the offender's program or reintegration, or would disclose information which was given with a reasonable expectation that it would be held in confidence.**

If not, what general principles would you propose? What information do you think should be provided to victims about individual offenders? Should it be provided in every case, or should correctional authorities have discretion to give or withhold information either to certain classes of victims or to individual victims? On what grounds? Which issues, if any, should be dealt with in law and which ones in policy? Why?

In addition to the privacy problems associated with giving victims information about offenders, the matter of how appropriate information can be released in a timely fashion also presents difficulties. As well as the need for good services to victims at or prior to sentencing, there will always be a need for some information to be sought from and provided by correctional authorities.

It is not always easy to respond to this need effectively, at least in part because correctional systems frequently have no precise or up-to-date information about the identity or address of the victim, and are unable to supply information unless contacted in time by the victim. Some victim groups feel that victim-initiated requests are difficult for individual victims, and have suggested, for example, that at the time of initial contact with the criminal justice system (or at any subsequent time), the victim be allowed to indicate whether he or she wishes to be kept informed about correctional decision-points and actual decisions pertaining to the individual offender in his or her case. Such requests could accompany the offender's file through the various stages of the criminal justice process and be kept with appropriate correctional case management and parole files for systematic response. It would be the responsibility of the victim to advise of changes in the victim's address or phone number.[30] The National Parole Board is now considering a policy whereby victims or their representatives may file a written "notice of interest" that would entitle them to receive certain information pertaining to the offender on an ongoing basis.

This approach has some appeal because it meets, at least partially, the concern of correctional authorities about the inappropriateness of them approaching directly, often many years after the offence, victims who have not indicated a desire to receive such information. However, although this procedure has been used in some American jurisdictions, critics have suggested that it is a bureaucratic approach which does not address victims' real needs and that it encourages some victims to seek information they might not otherwise have requested.

The "form" approach is also complicated by the likelihood that a victim's desire for information may change (and possibly lessen) over time. While initially a victim may want access to lots of information, where an offender is serving a long sentence, much of the requested information may not be available until many years after sentencing. Just as victims who have not requested information may be offended by approaches from correctional systems, so too may those whose desires for such information have declined with the passage of time. In the event that a request form is used, consideration could be given to updating the request form periodically to determine whether the victim still requires the information originally requested. Once again, this may be subject to the criticism of a depersonalized, bureaucratic approach. It may in fact be more important for correctional systems to provide adequate information about how individuals can get information that they want when they want it than to develop systems of automatic notifications of particular events.

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[30] Such an approach is recommended by the American Bar Association, *Guidelines for Fair Treatment of Crime Vicims and Witnesses* (Washington: ABA, 1983), pp. 12-16. The Guidelines note that the victim's interest in knowing when certain proceedings will take place is not necessarily diminished by the fact that his or her attendance is not required. Permitting victims to make a standing request for information avoids the victim having the burden of continuously monitoring the status of the case.

Also important is the question of whether information about an offender may be released to others, for example, to someone, other than the victim, who may be at risk, or to the press. The *Correctional Philosophy* paper reflects the principle that inmates ought not to be deprived of any rights or liberties beyond those necessarily curtailed by virtue of their incarceration. While it is appropriate to recognize the special status and needs of victims by permitting disclosure of limited personal information about offenders to them (or their designated representatives), information should not normally be released to others in the absence of threats or some other danger posed by the offender.

In addition, the surviving spouse or parents (perhaps all those in the immediate family) of a deceased victim may have the same needs for case-specific information as do victims. However, friends and family members of victims of offences such as theft, fraud or break-and-enter could not really be considered to have the same need for such information, although they may wish to obtain it. The extent to which close family members of victims who have been seriously injured could be considered to have case-specific informational needs similar to victims is much less clear and probably varies from case to case.

Finally, it makes sense to consider whether or not inmates should be advised about what information correctional authorities have released about them and to whom it has been released. Generally, it is important that inmates be kept informed of all matters related to their incarceration. Consistent with maintaining as open a prison environment as possible is the notion that inmates should be informed of decisions being made about them. Further more, in some cases, information about a victim's ongoing interest in the offender may affect release planning.

3 **Do you think that victims of crime should be given the opportunity to enter a standing request for and receive timely advance notice of the date, time and place of critical decisions in the correctional process, as well as information about the outcome of and reason for each critical decision? If so, what constitutes "critical decisions" and is this a matter to be put in legislation or policy? Why? Alternatively, do you think that requests for information should be made by a victim (or her or his representative) at (the) time(s) when the victim feels the need for such information? How should victims' changing needs for information be accommodated?**

4 **Do you think inmates should be entitled to know what information**

has been released about them and to whom it has been released? Are there circumstances where the offender should not be so advised?

5 **How should "victim" be defined for these purposes? To what extent, if any, should the definition be flexible?**

Use of Victim Impact Statements by Prison Authorities

Although issues related to sentencing are beyond the mandate of the Correctional Law Review, the fairly recent practice of permitting or encouraging victim impact statements (VIS)[31] is extremely important for corrections.

If a VIS is a sensible and useful means of ensuring that a prosecutor and judge have available to them all relevant information about the offence and its impact on the victim, it would appear also important that the VIS, together with other sentencing information, should be forwarded to correctional authorities in order to assist them in making the most sensible case management decisions about offenders.

Paradoxically, correctional systems often have great difficulty obtaining from courts what would appear to be the most basic information about offenders. Parole boards routinely request that judges specify the reasons for sentence and any intentions which judges may have regarding the offender's custody and treatment, but such information is only rarely forthcoming. This may in part be due to many judges feeling that their expertise does not lie in the assessment and treatment of offenders, activities which may be best left to correctional officials experienced in such work. It may also be connected to their understanding that such recommendations are not binding on correctional authorities, and/or to the large number of cases they consider. In some cases, judges may feel that correctional authorities could ascertain their reasons by ordering a transcript of the reasons for sentence (although in many cases detailed reasons for sentence are not given).

Proceedings on sentencing (which may include the gist of a VIS) are not generally transcribed unless there is an appeal. Yet it is unlikely that a full and proper administration of the sentence can take place in the absence of a clear understanding of the offence which occurred and the purpose of the sentence. To the extent that it is considered important for correctional decisions to be made on full, complete, relevant information, it is desirable that all information presented at sentencing (including pre-sentence reports, victim impact statements, where prepared, and counsel's submissions) and sentencing judges' reasons be transmitted to correctional authorities so they may inform placement and program decisions and pre-release planning. (The Canadian

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[31] Although VIS are not provided for in legislation, courts in most Canadian jurisdictions may accept them and, in some jurisdictions, the introduction of VIS at adult sentencing hearings is standard practice. As well, all pre-disposition reports for young offenders must take into account the results of an interview with the victim, where appropriate. Victim impact statement projects are operating in Victoria, Calgary, North Battleford, and Winnipeg, with funding assistance from the federal government. A province-wide VIS policy is in effect in British Columbia and Ontario has established a project in Metro Toronto. The use of VIS is consistent with item 6(b) of the UN Declaration of Basic Principles of Justice for Victims (*Appendix B*). Of note is the Alberta Court of Appeal which has more than once frowned on the submission of VIS: B. Cox, "Victim Reports Assailed," *Winnipeg Free Press*, March 13, 1987; *R. v. Huntley*, (1985) 61 A.R. 239. VIS legislation exists in many US states; in France, victims may participate in the sentencing process through the "partie civile" procedure which joins the victim's civil claim with the criminal prosecution.

Sentencing Commission recently recommended that judges provide written reasons in some circumstances and that a transcript of the sentencing judgement be made available to the authorities involved in the administration of the sentence).[32] The most comprehensive (although perhaps the most costly) method of achieving this objective would seem to be the routine transcription of the proceedings of sentencing hearings and the transmission to correctional authorities of such transcripts and exhibits filed. In addition, of course, victims may always make written submissions directly to correctional and release authorities about individual offenders.

There are two significant obstacles to transmitting sentencing transcripts to correctional authorities - their cost, and time delays associated with their preparation. To alleviate these problems, it may be desirable to specify the types of cases for which transcripts should be prepared. They could be prepared in all cases where a carceral sentence is imposed, or only in cases of lengthy carceral sentences. Even then, some transcripts may contain considerable information which is not entirely relevant or useful to correctional authorities. In any event, if transcripts are to be provided to correctional authorities, it will be necessary to determine which level of government should bear this cost.

6 **Should federal law require the transmission of sentencing information to correctional authorities? If so, should this occur only in cases involving violence or sizable property loss or damage? Perhaps only in cases of, for example, a sentence of imprisonment in excess of six months? In all cases of imprisonment? Do you have any suggestions as to how only the most relevant information could be selected, so as to limit the amount of material transmitted, some of which may not have been relied upon by the sentencing judge?**

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[32] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Report of the Canadian Sentencing Commission (Ottawa: Ministry of Supply and Services, February 1987), Recommendations 11.1 and 12.3.

PART II: CORRECTIONAL PROGRAMS WHICH RESPOND TO VICTIMS' NEEDS AND INTERESTS

Earlier in this paper, it was noted that victims have multiple interests. Some require opportunities to express their feelings formally; some wish to obtain restitution and compensation for losses; some need assistance in achieving resolution or closure in relation to the crime; some want opportunities to forgive and let go.[33]

Community corrections is the arena in which most victim-related correctional activity presently takes place. Many community sanctions provide opportunities, where it is possible and appropriate, for offenders to "repair the harm done" to victims in some way. For example, if an offender is willing to engage in reparations, therapy, supportive counselling, etc., suitably supervised conditions of probation provide the criminal justice system with opportunities to have him or her do so in a manner which permits reasonable accountability.

Judges may order restitution or compensation,[34] where applicable, as a mechanism for offenders to acknowledge responsibility for their acts. These orders are believed to encourage, and to provide a positive means for, offenders to recompense victims or society. Repayment can take many forms: It generally takes the form of financial restitution to the individual victim or, less commonly, reparation through service to the victim. It may also consist of service to a "substitute victim" (the community), commonly known as community service orders (CSOs). Fine option programs, as well as CSOs, also permit offenders of meagre economic means to make tangible efforts to "repair the wrong done."

A relatively recent development in community corrections has been Victim-Offender Reconciliation Programs (VORPs) in which trained mediators work closely with offenders and victims in order to establish settlements acceptable to both. In addition to meeting the victim's desire for reparation (either through restitution or service to the community or the victim), victim-offender reconciliation may lead to the resolution of specific disagreements between offenders and victims. Furthermore, both may be assisted in coming to terms with the criminal event by the insights gained by each about the other.

Although it may be easier to respond to victims' needs while offenders remain in the community, it is also possible to do so while they are incarcerated. Outlined below are some existing prison programs which respond to victims' needs or interests. Of course, legislation may not always be necessary to implement these programs. Nonetheless, they are discussed here because such programs can be of great benefit to both victims and offenders and because some proponents of their use feel that a legislated mandate would ensure their development and proliferation.

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[33] It has been suggested that forgiveness is more likely than vengeance to enable the victim to recover. The act of forgiving permits the victim to take responsibility for what she or he chooses to do about the criminal act and to put it behind him or her: L.N. Henderson, "The Wrong of Victims' Rights," 37(1985) *Stanford Law Review* 937 at 998.

[34] Restitution technically means the return of the thing taken and compensation generally refers to monetary compensation for property damages or out-of-pocket expenses. Both remedies are provided for in the *Criminal Code*. Where police have recovered stolen goods, they may be held until trial, after which they are returned to the owner (restitution). In most cases, the goods have disappeared, in which case the judge may order the offender to pay compensation to the victim pursuant to section 653 of the *Criminal Code* (or restitution or reparation pursuant to section 663(2)(e) as a term of a probation order). In some jurisdictions, the expression "restitution" means compensation. Increasingly "restitution" is used in Canada to refer to compensation ordered by the criminal court. "Compensation" is now used to refer to compensation which is provided by government-funded victim compensation programs.

VICTIM-OFFENDER CONFRONTATION PROGRAMS

Programs in which victims and offenders meet in the correctional setting to discuss the impact of crimes from both perspectives can sensitize offenders to the pain and suffering of victims and can give them opportunities to deal with remorse and guilt. One example of such a program is an Alberta Seventh Step "Surrogate Perpetrators Program" which matches offenders with victims - but not their own victims. Other such programs are a Victims of Violence program which allows groups of victims or their families to meet with sex offenders in Fort Saskatchewan, and a Centre d'Aide aux Victimes program which brings together Cowansville inmates with victims.

These programs give each participant an opportunity to meet the "other side" and exchange feelings. Victims have an opportunity to tell offenders how much they have been hurt by their victimization, and the encounter also permits victims to develop an alternate view of offenders which is frequently not as frightening as when the offender remains faceless. These programs benefit offenders too by allowing them to face their guilt and deal with it constructively, hopefully affecting their future behaviour as well.

VICTIM-OFFENDER RECONCILIATIONS

There have also been meetings inside correctional facilities between an inmate and his or her actual victim. This may occur at the request of victims who cannot resolve their feelings about the crime without such an encounter. Sometimes the offender and victim each express the desire for a meeting; often such requests are conveyed to a prison chaplain or volunteer. Usually the offender wants to express his or her feelings of remorse; the victim may feel the need to express forgiveness. It has been suggested that the inability of victims to overcome hatred and to forgive can be ultimately harmful to victims themselves; to forgive may be psychologically liberating, not just something one "should" do out of moral obligation.[35] Some have suggested that neither victims nor offenders can really recover from a serious offence without such a meeting.[36]

Encounters between offenders and victims take many forms - not all of them are face to face. The principle of reconciliation calls for a variety of things to be done that meet victims' needs, allay their fears, relieve emotional stress, and humanize their experience. It is of interest that there have been dramatic instances of close relationships developing between offenders and victims. Whether or not this occurs, these encounters usually result in significant changes in each of their lives.

Many victims' needs for assistance to deal with trauma are neglected and this may contribute to hostility towards "the system" and to those working with offenders. While much more could be done to provide conditions conducive to uncovering and supporting the desire for reconciliation expressed by victims and offenders, it is important to remember that these meetings cannot, and should not, be forced on unwilling participants.

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[35] Micheline Baril, Centre d'Aide aux Victimes, Montreal, in L.Berzins, *Report for the Task Force on Restorative Justice - Cases of Serious Violence* (Ottawa: Church Council on Justice and Corrections, 1986), p. 10.

[36] André Thiffault, Vice-Chair, Quebec Provincial Parole Board, in L. Berzins, *ibid*, p. 12.

INVOLVING INCARCERATED OFFENDERS WITH THE COMMUNITY AND VICE-VERSA

Just as the underlying reparative functions of victim restitution have led to the development of community service orders for impecunious offenders not requiring incarceration, institutional authorities have begun to see the value of community service programs, which may take place inside or outside prison walls, during an offender's period of incarceration. Indeed, many inmate committees and other inmate groups have identified opportunities for community service, most typically in the areas of charitable fundraisers and recreational and social programs for the disabled.

Many community service programs across the country are supported by offenders who have been incarcerated. For inmates who cannot leave prison, many community programs can be brought into the institution: ball games, parties for the aged, olympiads and gym classes for the disabled. At Matsqui Institution, for example, an inmate group meets with disabled adults weekly in the prison: each inmate group member is paired with one guest and together they jog, run, play floor hockey or other games. The group also sponsors an annual "Con Camp" sports event one weekend each summer for their adopted group.

During 1984, 256 inmates from Quebec penitentiaries used their day parole or temporary absences to contribute some 30,000 hours of free work for the benefit of many non-profit organizations and needy individuals. The opportunities for such work may be limited, of course, by outside labour's objections to inmates performing unpaid work where it takes jobs away from non-offenders; however, the value of this work to the community and to offenders are good reasons for maintaining and encouraging such initiatives.

While it may be suggested that victims themselves receive no direct benefits from the performance of community service by offenders, some satisfaction may be taken from the knowledge that some offenders endeavour to make reparations through their contributions to the community. Besides helping others, inmates benefit from such activities by learning organizational and vocational skills, reducing the boredom in their lives, reducing institutional tension, and helping to change the community's stereotypes about offenders.

It is also possible that through a greater emphasis on victim offender reconciliation, such activities could be more specifically linked to victims' wishes where victims do not want any direct contact with offenders or do not require restitution (or recognize the offender's inability to pay), but wish to see the offender do something tangible to "make good" or to compensate society.

RECONCILIATION IN PENITENTIARIES - PHILOSOPHICAL CONSIDERATIONS

In the *Criminal Law in Canadian Society* (*CLICS*), the Government of Canada articulated the overall goals and principles of the criminal law, which included the principle of reconciliation:

> Wherever possible and appropriate, the criminal lawand the criminal justice system should also provide for:

i) opportunities for the reconciliation of the victim, community and offender;
ii) redress or recompense for the harm done to the victim of the offence;...

Reconciliation, as proposed in *CLICS*, is aimed at resolving the dispute which resulted in the criminal act and at solving the problems or changing the circumstances which contributed to the dispute. Its inclusion in *CLICS* was intended to underline the legitimacy of alternatives to the usual criminal law processes and sanctions, so as to remove formal and informal barriers to their use where the nature and circumstances of the case make them appropriate.

Since reconciliation is one of the overall goals of criminal law, it is desirable to consider what modifications in current practices (such as placing a greater emphasis on the interests of victims and allowing them, where it is appropriate to do so, more participation in the criminal justice process) may be required to reflect this principle. Correctional opportunities may be provided for the victim, the offender and the community to restore the social balance of the community through activities which meet the needs of all. Corrections has long recognized the importance of the broader social context in meeting offenders' needs (particularly those related to family, education and employment). From this perspective, victim-offender reconciliation is a natural extension of the other reconciliative aspects of correctional activities.

The Working Group's tentative statement of correctional purpose and principles was discussed in the Working Paper on *Correctional Philosophy* (see *Appendix C*). It proposed a general purpose for corrections (... to contribute to the maintenance of a just, peaceful and safe society...) and it identified a number of methods by which this purpose may be achieved and the principles which should govern correctional agencies in the conduct of their affairs. If greater emphasis is to be put on reconciliation in corrections, the following strategy could be added to those already proposed:

> Wherever possible and appropriate, promoting and providing opportunities for the reconciliation of the victim, offender, and community.

In the corrections context, "opportunities for reconciliation" would include opportunities for the offender to make "redress or recompense for the harm done to the victim". The concept of reconciliation is based on the premise that in order for society to function in harmony, it is essential that any individual who has disrupted that harmony make amends by accepting the consequences of his or her actions and by attempting to repair the wrong. What constitutes "making amends" varies considerably from case to case. Some victims may require little more than a heartfelt apology. In other circumstances, the victim and offender may reach an agreement whereby the offender may engage in a more extensive program of reparations vis-à-vis the victim and/or the Community, some of which may occur while the offender is incarcerated (as described in the previous section) and some upon conditional release (discussed further in the next Part of the paper). Flowing from such a strategy would be the obligation of corrections to facilitate the development of communication and problem-solving skills among its staff and all individuals under correctional supervision or control.

Incorporating the proposed addition to the statement of philosophy could imply broadening the mandate of corrections to encompass victims, insofar as their concerns relate to activities or decisions within the correctional sphere, as well as offenders. It has been suggested that the criminal justice system, and therefore correctional agencies as part of this system, should have added to their responsibility to protect society a "positive obligation to take care of those who have been hurt."[37] This could include the provision of corrections related supportive services and programs for victims of crime. However, such a move might require additional resources to meet the expanded mandate and could lead to a dilution of both the focus of and resources for correctional agencies, particularly during periods of restraint.

7 **In what ways do you feel the principles of victim-offender community reconciliation are/are not applicable to inmates and the victims of incarcerated offenders?**

8 **Do you think the proposed statement of purpose of corrections should be amended to include reference to reconciliation?**

9 **Is the suggested addition to the statement of philosophy adequate and sufficient to support such initiatives? If not, what else do you think is required?**

10 **What would be the advantages or disadvantages of broadening the mandate of corrections to provide services for victims as well as offenders? If this were to occur, do you think that such victim services should be limited to those which are directly related to the mandate of correctional agencies? Would further amendments to the statement of purpose or principles be required to do so?**

RECONCILIATION IN PENITENTIARIES - PRACTICAL CONSIDERATIONS

Resistance to the idea that offenders can "right the wrong" tends to be stronger where inmates are concerned because they tend to be the offenders who have committed the most serious crimes. Because some of them have shown themselves to be dangerous in the past (a few, extremely dangerous), society has not considered that it may be possible for victims to have any kind of danger-free meeting with them. Finally, there has been an assumption that victims (and offenders) would be uninterested in such programs and unwilling to participate.

To those who suggest that victim-offender reconciliation may only be a viable option for certain (less serious) types of cases, the response is made that the most serious crimes are likely to be the ones in which the participants most need to deal with the trauma they have experienced and to overcome the feelings that may continue to hurt them. The Genesee County Sheriff's Department in New York State has been operating a VORP program since 1983 as part of an intensive victim assistance program. The program, which operates primarily at the pre-sentence stage, but often while offenders are imprisoned on remand, concentrates its efforts on only the most serious crimes. The program claims to have worked well in urban as well as rural settings.[38] It must be recognized, of course, that in the most serious cases, many meetings will have to be held with the victim and some with the offender prior to their face-to-face meeting; in these meetings a bond of trust must be built between the participants and the mediator.

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[37] *Ibid*, pp. 12-13.

[38] D. Wittman, "From Genesee County to New York City: Victim and Offender Find Peace Through Reconciliation," *Family and Corrections Network, Working Paper #5*, 1984. This article is included in *Appendix 3* (Genesee County, New York Sheriff's Department) of the NAACJ Reconciliation Proceedings, *supra*, note 15. See also p. 9 of that document.

Although there exist a number of barriers to the implementation of reconciliation in prison settings, some recent trends in federal corrections would seem to support more comprehensive use of reconciliation: the decentralization of administration and decision making, as well as the placement of offenders closer to home; deregulation, and more flexibility in the system generally; the increasing use of mediation as a problem-solving technique; and the development of more offender support programs. Most noteworthy perhaps, people-oriented security is now considered more important than static security.

Nevertheless, further initiatives are required if meaningful opportunities for reconciliation are to be provided in the prison setting. Enhanced staff training in problem solving, conflict resolution, communication skills, and the psychodynamic phases that victims and offenders, respectively, go through to cope with the trauma of the crisis situations each is facing should be provided to those interested in developing reconciliation options. Correctional officials and mediators must have the freedom to be flexible without fear of violating guidelines or regulations. Each offender will require an individual program plan, worked out in negotiations with the victim and/or a representative of the community. Preparation for reconciliation could begin at the time options for the offender's initial placement are being considered.

11 **Do you think there should be an obligation on correctional authorities to promote opportunities for victim-offender reconciliation or surrogate victim-offender encounters while offenders are incarcerated? What do you consider to be appropriate kinds of circumstances for reconciliation? If so, do you think the wording proposed on page 27 as an addition to the statement of correctional philosophy is adequate?**

12 **Is it sufficient to include in the correctional statement of purpose a reconciliation strategy or do you think some other legislative provision is required? Or is it a matter best left to policy?**

PAYMENT OF RESTITUTION BY INMATES

Canadian Crime Victims Association (CCVA) has proposed that part of inmate wages be deducted for court-ordered restitution. While restitution and compensation are seldom ordered when offenders are incarcerated, this practice could change.

Presently, unpaid restitution orders may only be enforced through civil court procedures. Provincial laws govern the garnishment of wages and other remedies available to creditors. Better enforcement provisions for all restitution orders is a matter presently under consideration by the Department of Justice.

Authorizing the deduction of restitution from inmate pay could raise two *Charter* concerns. It is not clear that inmates may justifiably be treated differently than other persons with outstanding restitution orders. Although it could be argued that inmate pay is not "wages" in the same way as income from employment outside a penitentiary, and can therefore be treated differently, this may not be sufficient to avoid the application of s.15 of the *Charter*. In addition, automatic deductions from inmate pay may violate the provisions of s.7 of the *Charter* in relation to the question of appeal from, or judicial review of, restitution orders.

From a practical viewpoint, however, most correctional systems pay inmates at such minimal levels (once "room and board" deductions are made) that the amount of funds left over for victims would be negligible. There are, of course, exceptions to this rule, usually involving inmates who are fortunate enough to find employment with outside private employers who operate businesses within or close to institutions and pay inmates at rates which are at least somewhat competitive with outside labour. In these instances, deductions for court-ordered victim restitution, as well as taxes and family support, may be desirable.

13 **Do you think that legislation which would permit court-ordered restitution to be deducted from inmate pay should be explored? Why? What do you see as the merits/drawbacks of deductions for court-ordered restitution from inmate pay where the wages are minimal?**

PART III: CONDITIONAL RELEASE

Conditional release from penitentiary is undoubtedly the most contentious issue in corrections, from the point of view of victims. While Canadian victim organizations have not recommended the abolition of parole (as have their American counterparts), they have made numerous criticisms of conditional release generally, and have called for many reforms. Only those recommendations for change which speak directly to the interests or role of victims will be addressed in detail here. This is because the more general issues related to conditional release, raised by other members of the public as well as some victims, are dealt with in the third Working Paper of the Correctional Law Review, *Conditional Release*. Readers who wish to respond to the whole spectrum of conditional release issues are referred to that document.

CONSIDERATIONS OF VICTIM REPARATION AT PAROLE

Ways in which offenders may make restitution or reparation directly to victims or indirectly to society have been discussed in the preceding Part of the paper. We consider now what, if any, victim interests could be addressed in relation to this during the release process.

With respect to victim-offender reconciliation, it seems unlikely that much would come of efforts to initiate it at this stage of the correctional process. Although permitting victims to attend or speak at parole hearings would certainly provide for a face-to-face meeting of the victim and offender, it is difficult to believe that much reconciliation is likely to result from such encounters unless parole boards, in cases where victims express a desire to be present, considered it part of their mandate to facilitate reconciliation - in which case considerable preparatory work would have to be done with both offenders and victims. Although this could be done, it would seem to be too late in the process.

It has been suggested that correctional systems permit offenders to use work release programs so that they may apply some of their earnings to making restitution to victims. As offenders are encouraged to seek employment when applying for or when obtaining parole, in addition to applying some of their earnings to the support of family members, such offenders could be required to make court-ordered or otherwise agreed-upon restitution payments. In appropriate cases, community service could be performed in lieu of making restitution.

The National Parole Board policy permits the imposition of restitution as a condition to which the offender must agree before being granted release only where the restitution has been court-ordered.[39] While the Ontario Parole Board has no policy specifically forbidding restitution, as a practical matter it is seldom made a condition of parole, perhaps because so many offenders are already subject to probation conditions upon their release, which may include restitution. (That Board's policy also cautions that special parole conditions should be used judiciously and viewed as an aid to assist the parolee's reintegration into the community and to reduce the risk to the community. The Board must ensure that the special conditions are reasonable and enforceable by the parole supervisor).[40]

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[39] National Parole Board, *Policy and Procedures Manual*, (Ottawa: NPB), p. 87.

[40] Ontario Board of Parole, *Policy and Procedures User Manual*, Section 4, page 10.

The British Columbia Board of Parole takes a somewhat different view, actually encouraging restitution, compensation, and victim or community service.[41] That Board considers that encouraging the offender to undertake reparative measures enhances the victim's and society's view of the concept of justice in fair sentence administration and provides an opportunity for the offender to acknowledge his or her responsibility for the offence and to make amends for it. It is believed to have the benefit of building public confidence in offenders by demonstrating their capacities to act responsibly.

In establishing its victim reparation policy, the British Columbia Board considered the following guidelines:

1 Inmates should be made aware of the possibility of reparative conditions or agreements prior to application.

2 The program should not be punitive but should emphasize its positive and constructive values.

3 When the possibility of victim reparation can be readily identified and the prisoner/parolee is willing and capable then the Parole Board should ensure that a Victim Reparation Program is designed to meet the reasonable needs of the victim and the reasonable capabilities of the offender.

4 Reparative conditions and agreements should be consistent with the offence and with the intent of sentence when known.

5 Any program involving contact between the victim and the offender must be mutually agreed upon and either party should have the right to refuse interaction.

6 All reparative conditions or agreements must be clearly defined and accepted and any consequences for failure to meet them must be understood from the onset of the program.

The Board decided that where the sentence contains an order for victim reparation which remains outstanding at the time of the parole hearing, the Board may impose a special condition on the parole certificate that the parolee complete a specified portion of the court-ordered reparation within the timeframe of the parole certificate, default of which could lead to suspension.

Where no reparative order has been made at sentence, the Board may include as an "agreement for release" on the parole certificate a statement of the parole applicant's proposed reparative activities provided that the victim (if identified) and inmate are both willing to be involved. Where the agreement breaks down, the focus in supervision should be to seek restoration, or an alternative, rather than suspension.

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[41] BC Parole Board, *Manual of Policy and Procedures*, Chap. 31, pp. 108-111.

There are, however, a number of arguments against imposing parole conditions related to restitution and reparations. Perhaps most importantly, such conditions (especially restitution) might well be illegal, in that they could be seen to impose a sentence (which only the court has the authority to do), or to impose an additional punishment contrary to section 11(h) of the *Charter* which provides that a person found guilty and punished for an offence has the right not to be punished for it again. This argument would be stronger in cases where the sentencing judge has considered the appropriateness of such an order and declined to make it. Alternatively, in the absence of such a consideration at sentencing, the argument may be weaker in instances in which the offender can be said truly to have voluntarily entered into the arrangement or when the released offender chooses to serve part of his or her sentence in a residential setting in the community and take employment in and be paid through a state-organized workshop (which does not occur frequently in Canada). However, it may be difficult to draw the line between subtle coercion and voluntary participation.

It is also not clear that restitution or reparations are appropriate conditions for paroling authorities to impose. Parole conditions are generally designed to minimize the risk an offender may present, and to facilitate the reintegration of the offender into the community. It may be argued that restitution is not related to risk containment, nor is it directly related to reintegration. Furthermore, in the absence of a court order establishing the quantum of restitution, concern has been expressed about the adequacy of procedural safeguards at the parole hearing - at a sentencing trial, the offender's counsel may cross-examine Crown witnesses regarding the quantum of restitution claims.

Finally, we also have to recognize that, since most offenders have very few resources at the time they leave prison or penitentiary, to require restitution will in many instances create an unfulfillable condition, the violation of which would result in suspension and return to the institution. Parole conditions of restitution could seriously jeopardize offenders' readjustment to life in the outside community and, in extreme cases, they could even push offenders back into crime in the effort to accumulate the funds needed to make restitution payments.

Questions about such programs may be lessened in instances where a client-specific plan is developed, often with the help of a skilled mediator who obtains the agreement of both victim (or community) and offender, especially where the offender is given special consideration for release at an early date. Furthermore, other reparative conditions, such as community service, may be viewed more favourably, particularly where they may be characterized as a component of the program or method of serving the sentence.

In addition to the issue of whether parole boards should consider victim reparation which might take place during the parole period, one might ask whether parole boards should or should not be permitted to take into account in their release decision-making what efforts offenders have already made towards victim/community reparation. Few opportunities are presently available to inmates which would facilitate such efforts. Nevertheless, if these opportunities are to be expanded, this is a factor parole boards could be encouraged to review.

14 **Do you think it would be appropriate for parole boards to use restitution or reparative conditions connected with parole release where court-ordered? Why? What action should be taken if an offender is in breach of such a condition? Why?**

15 **Do you think "voluntarily entered into restitution or reparative conditions connected with parole release are appropriate in the absence of a court order? Why? What action should be taken if an offender is in breach of such a condition? Why? What procedural safeguards, if any, do you feel should be added to the hearing process to ensure due process in the assessment of quantum?**

16 **Are reparative conditions or agreements suitable for all types of offences? All offenders? If not, which ones should be excluded? Why?**

17 **What role, if any, should community groups and agencies play in relation to the use of victim reparation during parole?**

18 **Do you think the criteria for release set out in section 10 of the *Parole Act* should be amended to require consideration of reparative activities or reconciliation? Alternatively, should parole boards be permitted to consider or be precluded from considering what efforts prisoners have made, or propose to make, towards victim reparation:**

a) **where restitution or some other reparative order was made by the sentencing judge?**

b) **where no order was made at the time of sentencing?**

OPENING PAROLE HEARINGS - THE ROLES OF VICTIMS AND OTHER MEMBERS OF THE PUBLIC

The issue of whether victims should be entitled to, or permitted, any form of participation at parole hearings is an extremely sensitive subject. Such participation could take a number of forms: victims could be permitted to attend the entire hearing as observers, without the opportunity to make comments; they could be authorized to attend at the beginning of the hearing to make an oral presentation to the board; or, they could be permitted a more active role, including making submissions at the end of the hearing.

It has been suggested that victims of violent crime have a legitimate interest in seeing that their attackers are not released prematurely. Some victims argue that their participation at parole hearings would ensure that the parole board has in front of it an accurate and detailed depiction of the nature of the offence and any related, relevant information (such as subsequent threats received from the offender) which could describe the crime committed or the risk of future crimes being committed. Such information could also assist parole boards in imposing appropriate conditions on the offender after release, such as that he or she remain out of the area in which the victim resides. This argument is strengthened in cases where the parole board has not received, for whatever reason, a victim impact statement in the case.

One could also argue that the victim's "need to know" what ultimately becomes of the offender entitles the victim to attend the hearing as an observer, or that increasing victim participation will make victims feel better about the criminal justice process. However, the reasons for making such a change must be examined in the context of what is relevant to the decision maker's mandate. The extent of the trauma suffered by the victim is not necessarily as relevant to the decision to grant or deny parole as it was to the sentencing decision. Sentencing is based in part on denunciation and deterrence of criminal behaviour, while release decisions are based primarily on an assessment of the offender's risk. Of course, the actions of the inmate that caused or contributed to the trauma are relevant to the assessment of the risk the offender poses to the community, if released, and may be relevant to the establishment of suitable conditions of release. Taking into account the experience and/or opinions of victims seems most appropriate where the victim (or his or her family) and offender are likely to be in contact with one another after release.

It should be remembered also that parole boards are not created to re-sentence offenders. A parole hearing is not the place to make submissions about the appropriateness of the statutory eligibility and criteria for parole; the role of the parole board is to apply the statutory criteria in a particular case.

The question of whether victims should be permitted to attend parole hearings, even as observers, is complicated by both legal and policy concerns. Unlike judicial processes such as trial and sentencing, parole hearings are not open to public scrutiny. (Parole boards are one of several administrative tribunals whose hearings are held *in camera*.) Some advocate that parole board hearings should be open to the public, including the media, and that official transcripts be made of the proceedings so that hearings would "move out of the shadows", for the benefit of victims, offenders and the public alike. It is also argued that public hearings would enhance parole board accountability and restore public confidence, for the functioning of parole boards is one which directly affects public safety.

On the other hand, the principal argument against public hearings is that they would be less likely to evoke a free and frank exchange of information and opinion between parole board members and the offender. Also, highly personal information about the offender, which is presently subject to *Privacy Act* protections, would be disclosed. Media reports of individual cases could lead to the identification or harassment of individual offenders, thereby adversely affecting their ability to reintegrate into the community.

Although the latter concern might be addressed through a ban on publication of the identity of parole applicants, it is not at all certain that such a blanket prohibition would withstand a *Charter* challenge. Indeed, the current rules providing for *in camera* hearings for many administrative tribunals may themselves be vulnerable.[42] Nonetheless, the likely adverse impact on the reintegration of offenders which could result from fully open parole hearings justifies continuing some restrictions. As we have seen in other issues, it is necessary to balance the parole applicant's privacy interests with the public's concerns about safety and with the integrity of the parole decision-making system.

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[42] It seems clear that the press will have access to all judicial proceedings (although in some cases the identity of parties or witnesses may be protected), and it may well only be a matter of time until the press will seek access to most tribunal proceedings which are presently held *in camera* - particularly those closely associated with the administration of justice. Recently, the Federal Court ruled that immigration inquiries should be open to the media, noting that such hearings have become part of the administration of justice, are subject to all the guarantees of the *Charter*, and cannot be closed for administrative ease or convenience: *Southam Inc., et al v. Minister of Employment and Immigration et al*, Doc. T-1588-87, July 27, 1987 (not yet reported). In the event that the press are permitted to attend and report on parole hearings, the Working Group considered whether parole applicants should be permitted to apply to have some aspects of the hearing held *in camera* or to have a ban on publication of certain aspects of the proceeding, as well as on the identity of the parole applicant. If such measures are to survive *Charter* challenges, they will have to demonstrate that they are designed to protect social values of super ordinate importance and it would be wise for legislators to leave with the tribunal some discretion as to whether or not such orders should be made in all circumstances. Ontario endeavoured to accomplish the latter with respect to its child

At the same time, it is valuable for parole boards to make every effort to be as open as possible. The National Parole Board, for example, has on occasion permitted representatives of the press and victim organizations to attend parole hearings as observers. This appears to have led to a greater understanding of the parole process, and has increased its credibility in the eyes of the observers. For these reasons, such efforts should be continued, at least on a selective basis.

A number of arguments are advanced against the desirability of permitting victim participation at parole. At sentencing the offender has considerable scope to challenge the validity of the victim's statement both through cross-examination and the presentation of his or her own evidence. Not only is the offender more limited in such opportunities at parole, some aspects of a new statement by the victim at the time of release consideration may be less reliable than those made closer in time to the date of the offence.

It is also feared that the presence of victims will unduly bias parole boards and that, especially in cases of impassioned presentations from victims, it will be impossible for the board to objectively assess the offender's risk and other factors which it is supposed to consider. A related objection is that since only some victims will appear before the boards (a US study suggests that very few will),[43] this bias will be injected only into some cases, and the outcome may be determined not by the full range of case-related factors, but by the circumstances of the victim. As articulate and well-educated victims may be able to make more persuasive cases for their viewpoints than may other victims (or those who do not participate), it is feared that permitting victims to speak at hearings would cause disparity in parole decisions. Some bluntly

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welfare proceedings by enacting sections in its *Child and Family Services Act*, S.O. 1984, Chap. 55, that provide for hearings to be held in the absence of the public unless ordered open and in the presence of media representatives unless excluded; the *Act* also prohibits publication of information which would have the effect of identifying young people. The Ontario Court of Appeal has upheld publication bans on the identity of young persons connected with *Young Offenders Act* proceedings and of adult complainants in sexual assault trials prosecuted under the *Criminal Code*. In both cases, the bans were held to constitute a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In the former case *(Re: Southam Inc. and the Queen, [Southam No. 2])*, (1986) 20 C.R.R., 7), the Ontario Court of Appeal accepted the reasons of the High Court Judge (reported at (1985), 12 C.R.R. 212 (1985); 14 D.L.R. (4th 683; and (1985) 16 C.C.C. (3rd) 262) who was convinced by the expert evidence he heard that harm could come to such young persons from publication of their identities and that it would be virtually impossible for judges to predict in which cases harm would result. (The Supreme Court of Canada declined to hear a further appeal by the press.) In the latter case, *Canadian Newspaper Co. Ltd. v. A.G. of Canada and Regina v. D.D.*, (1985), 14 C.R.R 276; (1985), 16 D.L.R. (4th) 642; (1985), 17 C.C.C. (3rd) 385, the Court held that the *Criminal Code* provision permitting a publication ban, except with respect to its mandatoriness, was valid and a reasonable limit for the purposes of encouraging sexual assault complainants to pursue criminal charges and to testify. While adults have not traditionally been protected in this way (where children have frequently had special status under the law), it may well be that similar evidence could be adduced with respect to the risks which could be expected to befall parolees whose identities and whereabouts are publicly known while they are attempting to reintegrate in the community successfully. This type of consideration convinced an Ontario Supreme Court Justice that the equality provisions of the *Charter* should protect the accused (prior to conviction) as much as the complainant where a publication ban is ordered to protect the identity of the complainant: *Regina v. R.*, (1986) 28 C.C.C. (3d) 188.

[43] D.R. Ranish and D. Schichor, "The Victim's Role in the Penal Process: Recent Developments in California," (1985) 4 *Federal Probation*, p. 54. In only 14 of 818 parole cases heard in the first year after the *California Bill of Rights* was enacted, did victims (32 in total) file requests to appear before the California Board of Prison Terms. (This parole board hears only cases related to lifers. The public has for some years had an opportunity to submit written comments pursuant to a "public outcry clause".)

assert that such proposals are
designed to intimidate parole board members by attempting to influence them to deny parole more frequently.[44]

However, if victims were authorized to attend parole hearings to make oral comments to the board, the principles of fundamental justice suggest that these comments should be made at the beginning of the hearing. This procedure is presently employed by the Ontario Board of Parole, which ensures that a record of the comments is prepared and presented to the parole applicant for comment. It would be preferable for such statements to be made in the presence of the inmate, except in those rare circumstances where the board may withhold from the offender all but the "gist" of information. Such a procedure would maximize the prospects of fairness (both real and apparent) for the inmate seeking to affect his or her release.

The submission or updating of victim impact statements does not present the same problems. The policy of the National Parole Board is to consider, either before or during hearings, any written submissions received from victims, although Board members will not meet with victims personally. Victims may meet with Parole Board staff who will make a record of their comments for the Board members. The Board will also consider VIS which have been submitted at sentencing. These may be updated by Board staff; procedures instruct case preparation officers to contact victims where appropriate.[45] These written statements form part of the information considered by the voting members of the Board; they are disclosed to inmates unless it can be demonstrated that the public interest in withholding the information (threats to the victim, etc.) is greater than the offender's right to obtain access to the information.[46]

While victims in Canada have the prerogative of writing to parole boards expressing their views about the early release of an inmate, few seem to be aware of this. It has been suggested that the fact that victims may write to the National Parole Board should be more widely publicized and that more victims might avail themselves of the opportunity to express their views if this prerogative, along with the obligations of Parole Board members to consider such submissions, were entrenched in legislation. Others feel that it is unnecessary to place the "right to write" in legislation, but that the obligations of parole boards when receiving such submissions could be codified. The NPB is presently circulating its new policy on victim representation. This may increase public awareness of its willingness to consider victim submissions.

Victim impact statements which are considered at sentencing and forwarded with all sentencing information to correctional authorities (as discussed at p. 20 *supra*), including parole boards, will ensure that adequate information is before decision-making authorities and will address the expressed concerns of victims. Where VIS have not been previously submitted, or where they require updating, victims may, where they wish to do so, send a written submission to the National Parole Board. (Such statements and submissions should of course be made in sufficient time to permit disclosure to the offender).

19 **Where a victim has indicated an interest in being informed about the release of an inmate, should solicitation of a written victim statement**

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[44] *Ibid*, p. 54.

[45] National Parole Board, *supra*, note 39, p. 43.

[46] *Ibid.*, p. 62; *Parole Regulations*, s. 17, SOR/78-428 as amended; *Cadieux v. Mountain Institution and National Parole Board* (1984), 9 Admin. L.R. 50, 41 C.R. (3d) 30, 13 C.C.C. (3d) 330, 10 C.R.R. 248 (Fed.T.D.).

be a standard part of case management procedures? Should victims be permitted or encouraged to update statements which have already been submitted? What limitations, if any, should there be on the content or form of such statements? Are such issues best dealt with through law or policy? Why?

20 **Should individual victims be permitted to attend parole hearings for the case about which they are concerned? If so, do you think that their role should be limited to observer status or should victims be entitled to some form of participation? Should they be permitted to attend the whole hearing? Is this issue best dealt with through law or policy? Why?**

21 **Should federal law permit the opening of parole hearings to the public? Why? If so, should the Board have discretion to control who attends the hearings? Why?**

22 **What limitations, if any, should there be on publication of information about the parole applicant? Why?**

REVIEW/APPEAL OF PAROLE DECISIONS BY VICTIMS

If victims were permitted to attend or testify at parole hearings, it could be argued that they should also be advised of the decisions of the board and their reasons, as is the situation in some American jurisdictions. Does it follow that the victim should then also have the right to appeal an "adverse" decision of the board?

It has been advocated that in some cases where a parole board decides to release an offender against the wishes of the victim, the victim should have the right to appeal the decision to a court on its substantive merits. (Such advocates also support the right of the offender to substantive judicial appeal of parole decisions).

A distinction should be drawn between a situation where a victim wishes to bring new information to the attention of the decision maker after the decision has been made, and a situation where a victim simply disagrees with the decision and wishes to have it reviewed by someone else. Unlike a court, which generally loses jurisdiction once a decision has been pronounced, a parole board retains jurisdiction to reconsider its decisions.[47] Should information come to light which was not considered in reaching the decision, the board may reconsider. While it will be reluctant to reverse an earlier decision to release an offender except where there is very clear evidence of risk, new information could lead to additional conditions being placed on the release, or more intensive supervision of the parolee.

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[47] In *Re Conroy and the Queen*, (1983), 5 C.C.C. (3rd) 501, the Ontario High Court held that the National Parole Board could impose reasonable conditions on a parolee when a change of the circumstances dictated that it do so. The Court noted that the Parole Board had exclusive jurisdiction for parole and that it must have implicit powers to correct any injustices created by its own actions or orders. (The Court went on to hold that a parolee must give an informed consent to waive a post-suspension hearing, otherwise the parolee is entitled to a hearing.)

Presently, the *Parole Regulations* provide that federal offenders who have been denied full parole or who have had their parole or mandatory supervision revoked may request a re-examination of the decision. NPB policy provides that such decisions may be modified or reversed if the appeal division of the Board is of the opinion that the decision may have been prejudiced by a breach or improper use of the procedures under the *Act*, *Regulations* or policies, that it was based on erroneous or incomplete information, or that the information available at the re-examination indicates the decision was inequitable or unfair.[48]

While consideration could be given to broadening the scope of this Regulation to encompass victims, perhaps in more limited circumstances than its availability for offenders, it seems unlikely that this would offer victims anything more than the informal remedies already available to them. Victims do not need statutory authority in order to write to parole boards with information about an offender, either before or after the offender's release. Even without such statutory provisions, parole boards take information received from victims extremely seriously. Nonetheless, as has been suggested previously, it may be desirable to formalize this. Obviously it is preferable for such views to be considered prior to the initial decision. The provision of timely information to victims about the parole process, should facilitate this.

With respect to the question of external review of parole board decisions, there is presently no judicial appeal[49] from parole board decisions, and only a limited right of judicial review[50] where offenders can demonstrate a failure on the part of the board to comply with the common law duty to act fairly or with s.7 of the *Charter*.

Substantive judicial appeal from decisions of a tribunal such as a parole board is precluded because it is recognized that, particularly where decision makers are operating in a relatively well-defined area, there is limited value in permitting judges to simply substitute their decisions for those of tribunals, which are often constituted for their expertise. Furthermore, in a court, judges have to make findings of fact and then choose and apply the relevant legal rules. Appeal from judicial decisions is normally based on mistake of law, and only in limited circumstances on mistake of fact. A parole board, however, makes a very different type of decision. On the basis of the circumstances of the original offence, together with information about the offender's participation in prison programs, any psychiatric and other assessments and the offender's plans for release, the board makes an assessment of the offender's potential risk to the community, and the viability of his or her release plans. Provided that the board conducts itself according to the normal rules of procedural fairness, considers all relevant information and applies the statutory criteria for parole, the decision is not and should not be subject to external review just because someone disagrees with the result. As noted above, a victim who disagrees with a parole board decision can write to the board explaining the nature of his or her disagreement.

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[48] *Parole Regulations*, s. 22, *supra*, note 46; *NPB Policy & Procedures Manual*, *supra*, note 39, p. 73.

[49] Judicial appeal, which must be provided for in law explicitly, permits a more extensive review of the tribunal's decision than does judicial review. There is presently no right of judicial appeal from parole board decisions - by the offender or anyone else - although they are subject to judicial review.

[50] Judicial review means the review by the Federal Court of Canada of the decisions of the National Parole Board (as any other federal administrative tribunal) pursuant to section 18 of the *Federal Court Act*, R.S.C. 1970, c.10 (2nd Supp.), as amended. The Court may review decisions of the Board which violate the duty to act fairly, which are in excess of its jurisdiction (failing to take account of the legislative criteria for release, for example), or which violate an offender's rights under the *Charter*. Applications before the Federal Court may be brought to hearing quite quickly. Decisions made by provincial parole boards may be subject to judicial review pursuant to provincial legislation.

It should be noted that, to date, only offenders have applied for judicial review of National Parole Board decisions under the *Federal Court Act*. Interestingly, victims do not appear to be precluded from pursuing such applications, and while it seems unlikely that "standing"[51] would be granted except in unusual circumstances where a victim (or perhaps some other member of the public) could demonstrate a very direct connection between his or her safety and the decision to release or the conditions related to the release, the courts would have to consider such an application. Presumably the applicant would have to show something beyond the offence itself for which the offender was incarcerated as a clear and significant reason for ongoing apprehension.

In summary, it is preferable that changes in the role of victims at parole should focus on those which are likely to ensure that parole boards make good decisions in the first place and on those which contribute to public confidence in parole decision-making, while taking into account the importance of protecting offenders, rights to fair hearings. The submission and updating of VIS contribute to both of these goals. Mechanisms, either periodic or on a regular basis, which permit victims, the press or members of the public to attend the hearings as observers may contribute to the second.

23 **Do you think that victims should be accorded a right of *internal* re-examination or review of decisions by parole boards? If so, in what circumstances? If not, why not? Should this be incorporated in law?**

24 **Do you think that *judicial appeals* should or should not be available to victims and/or offenders? Why?**

25 **In what circumstances, if any, do you think it would be appropriate to permit a victim to apply to a court for *judicial review* of a parole decision? Why?**

COMPOSITION OF PAROLE BOARDS

One victims' group has advocated a "complete overhaul" of parole boards to ensure a larger representation of the public. Others have called for the appointment of victims to parole boards to ensure that victims' perspectives are considered in parole board decisions. Generally, there is a feeling among victim groups that there is insufficient "community input" in parole decisions.

Parole board members come from all walks of life and in that sense can be said to represent the community. Currently, parole board members are appointed by Order in Council for fixed, renewable terms, on either a full-time or part-time basis. Much public criticism has focused on the political nature of these appointments, the lack of relevant experience of some members - in such areas as psychology, criminology, and law - and the inadequacy of formal instruction given to parole board members.

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[51] "Standing" means the right to bring an application to be heard. Traditionally, parole decisions were considered to be administrative in nature and not quasi-judicial; hence, s.18 of the *Federal Court Act* determined the appropriate forum (Federal Court Trial Division) for applications to review the decisions of parole boards. No limits have been placed legislatively on who may bring an application under s.18. Historically, the determination as to who has standing to apply for certain prerogative remedies such as certiorari (an application to quash the decision of the tribunal) has been considered to be very broad. While a mere busybody would not have standing to do so, courts have varied in their interpretations of how directly affected a person must be to bring such applications. It should be noted that when (and if) parole decision-making evolves to a quasi-judicial function, victims may find themselves in a more difficult position with respect to standing. Although section 28 of the *Federal Court Act* refers to a person "directly affected by the decision", except in very unusual circumstances, this likely refers exclusively to the offender in the parole context.

The *Parole Act* and *Regulations* are silent on the question of appropriate qualifications of board members; no special prior experience or training is required. The BC Board of Parole recommends the following criteria for appointment to its Board: demonstrated sense of responsibility and interest in community affairs and concerns; ability, experience and objectivity consistent with the independent decision-making role of the Board within the framework of the justice system; and broad credibility within the community, as opposed to the more limited representation of specific interest groups, attained through endeavour and achievement in community participation, as well as in the appointee's career.[52] The Solicitor General has recently established guidelines for the recruitment of qualified National Parole Board members.

Since 1977, the NPB has been composed of a number of "community members" in addition to regular members: the *Parole Act* permits the federal Solicitor General to designate representatives of police forces, local and provincial governments, trades, professions, and community associations on regional panels of the National Parole Board. The participation of these community members is required in certain kinds of hearings concerning offenders serving indeterminate sentences or life imprisonment for murder; in these hearings, community members exercise the same powers and duties as regular Board members. Where an appeal panel disagrees with a decision of a panel involving community members not to grant parole, it may only order a reconsideration of the case by a new panel (which will also have community members) - it cannot overturn the decision.

There exists no explicit prohibition against the appointment of victims to parole boards. Victim organizations suggest that it may be beneficial to appoint persons who have been victims, or who are associated with the victims' movement, in order to ensure that the viewpoint of victims is represented. However, to do so raises the prospect of potential conflicts of interest.

Obviously, victims could not be entirely impartial in cases which have affected them directly or even indirectly. Presumably, this could be dealt with through appropriate selection of cases to be heard by individual members. One might also caution against the appointment of victim advocates who may have been or may be lobbied by other victims with respect to particular offenders. The Ontario Parole Board has established conflict of interest guidelines which address some of these concerns. For example, someone who has been a victim of an offence of a similar nature as the one presently before the Board would have a potential conflict, and would not form part of the panel hearing that particular case.[53] Similarly, regulations governing the NPB require that Board members withdraw from cases where "a reasonable apprehension of bias may result from the particular circumstances of the case, including ... connections with the inmate or the victim ... [of the case]; ... The Chairperson may order a member to withdraw from a case where, in his or her opinion, participation may result in a reasonable apprehension of bias.[54]

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[52] BC Parole Board, *supra*, note 41, Chap. 29, pp. 15-16.

[53] BC Parole Board, *supra*, note 41, Chap. 29, pp. 15-16.

[54] *Parole Regulations*, s. 22.1, SOR/78 - 428 as amended by SOR/86 - 817.

If victim representation on parole boards were considered either desirable or undesirable, it would be important to clarify who would be considered to be within the category "victims". Some people think of victims as those people who have suffered violence at the hands of an offender; others would interpret the word more broadly to include anyone who has been the victim of any criminal act - property-related or against the person - whether or not it resulted in charges being laid. Family members of victims, particularly of those victims who have been seriously injured or killed, may also consider themselves to be victims in that they may experience the same sort of trauma or grief that victims themselves may - their lives may be profoundly affected by the criminal act.

If victim representation were to be solicited for parole boards, consideration might be given to the appropriateness or inappropriateness of selecting victims who are members of, or active in, victim organizations. If such persons were selected, should they be expected to resign their membership in such organizations after appointment?

Whether federal law should specify particular criteria or qualifications for the appointment of parole board members or whether such matters should be left to policy or individual discretion are topics for consideration in the *Conditional Release* Working Paper. The following questions focus on the possible participation of victims as parole board members.

26 **Should federal law either require or, alternatively, preclude the appointment of victims of crime to parole boards? Why? How should membership in victims' organizations be treated?**

SUMMARY

The role of victims in criminal justice processes has changed over time. As a society we have become more aware of the needs and interests of victims in recent years. Exploring ways in which corrections may respond effectively and creatively to these needs is both appropriate and timely.

The proposals victims make for the reform of corrections and their role in correctional processes are controversial and have an emotional impact on all of us. In this paper we have examined these proposals and our assumptions about corrections and offenders in keeping with earlier proposals in the paper on *Correctional Philosophy*, seeking to balance the competing interests and rights of people who will be affected by the outcome.

Recognizing the importance of informational concerns, the paper recommends improving the access of correctional officials to information about the offence and the victim to ensure that sound decisions are made about offenders during their incarceration and upon release. The paper acknowledges the importance of the victim's experience and the desirability of ensuring that victims have ready access to the information they are entitled to receive.

Victim-offender-community reconciliation is considered as a technique to meet the needs of and enhance the positions of victims and the community in ways which may have positive effects on (and be well-received by) offenders and on the relationships among victims, offenders and the community. In particular, the paper examines the ways in which offenders might be able to engage in reparative sanctions, such as restitution and community service, during probation, incarceration, and parole.

In considering ways in which victims might play a more active role in parole decision-making, the paper recognizes the validity of the competing interests at stake. The challenge facing corrections and those who seek to influence its course is to find the appropriate balance of these interests.

ANNEX "A"

LIST OF THE PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Native Offenders

Mentally Disordered Offenders

Sentence Computation

The Relationship between Federal and Provincial Correctional Jurisdictions

International Transfer of Offenders

APPENDIX "B"

UN DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

1 "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States, including those laws proscribing criminal abuse of power.

2 A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3 The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to Justice and Fair Treatment

4 Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5 Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6 The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
c) Providing proper assistance to victims throughout the legal process;
d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and

witnesses on their behalf, from intimidation and retaliation;

e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7 Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8 Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9 Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10 In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11 Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12 When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13 The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14 Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15 Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16 Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17 In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

APPENDIX "C"

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful reintegration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1 Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2 The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3 Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4 In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7 Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

CORRECTIONAL AUTHORITY AND INMATE RIGHTS

Correctional Law Review
Working Paper No. 5,

October 1987

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the *Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons & Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14 - month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and aftercare agencies, victims' groups, an employee's organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal-provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the

working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

This paper provides a basis for discussion of the wide range of complex issues surrounding inmate rights and the closely related area of staff powers.

The main feature of the paper is a set of proposals for possible inclusion in the law to govern inmate rights and staff powers. These proposals, provided in summary form in *Appendix C*, are intended to clearly set out the individual rights of inmates while incarcerated and to provide guidance to staff in how to carry out their duties. Areas covered include transfer of inmates, administrative segregation, the inmate disciplinary process, search of inmates, visits, mail, and freedom of religion, as well as general conditions of confinement.

It should be noted that these proposals do not represent a government position, as no decisions have as yet been taken as to appropriate legislation. At this stage, the proposals are intended to raise issues for discussion and consultation. The government is not committed to a particular course of action, but is actively soliciting public and professional input before a final determination is made.

In developing these proposals, the nature of the inmate's interest in retaining certain rights and freedoms has been analyzed, as have specific security and other institutional concerns. Even though it is a relatively simple matter to state the basic premise, that is, that "inmates retain all rights, subject to any limitations necessitated by the fact of incarceration", it is much more difficult to determine what specific limitations on rights are appropriate and justifiable. The proposals represent an attempt to balance the various interests, and accompanying commentaries explain how the various factors thought to be relevant were weighed. During the course of the consultations we will be discussing the factors relevant to a particular area, as well as whether appropriate weight has been given to those factors, and whether other factors should be considered.

In many cases, these proposals reflect present CSC policy found in the Commissioner's Directives (CDs). The paper takes the position, however, that they should be set out in law. We have not, at this stage, distinguished between those provisions which should be contained in a statute, and those which are more appropriately a matter for regulations. Nor have we drafted the proposals in the precise language which will be necessary for legislation. The focus at this point is on the substantive issue of "what should be set out in law", rather than on questions of formal drafting and the details that should be in regulations as opposed to statute.

The paper concludes with an examination of common issues and concerns that arise in enforcing rights in an institutional context. Judicial remedies available to inmates who feel that their rights have been infringed or denied are first considered, followed by a discussion of other approaches, such as inmate grievance procedures and the Correctional Investigator.

INTRODUCTION

The advent of the *Canadian Charter of Rights and Freedoms*[1] has sparked a renewed interest in the protection of fundamental rights in Canada. In light of this, few areas of the correctional system are undergoing more scrutiny than that having to do with the rights of inmates.

This paper seeks to provide a basis for discussion of the wide range of complex issues surrounding inmate rights and the closely related area of staff powers. It addresses issues that arise in relation to incarceration in federal penitentiaries. It does not, however, deal with rights issues in regard to release, which is the subject of a separate Working Paper entitled *Conditional Release*. Nor does it deal with any issues arising under the equality rights section of the *Charter* in relation to differences, if any, in the treatment of inmates in the federal and provincial systems. These issues will be dealt with in the Working Paper on the *Relationship Between Federal and Provincial Jurisdictions*. The Correctional Law Review Working Group is, however, sensitive to the fact that although this paper is directed at the federal system, it may nonetheless have an impact on provincial systems.

This paper does not discuss every area where inmates may have certain entitlements, but chooses a number of major areas for consideration: conditions of confinement, fairness in decisions affecting inmates, and procedures to govern activities such as search of inmates. The paper's main feature is a set of proposals for possible inclusion in law concerning inmate rights and staff powers. These tentative proposals attempt to clearly set out the safeguards and limitations on individual rights and staff powers in the correctional context in order to generate discussion about what legislative provisions should look like, what degree of specificity is appropriate, and what impact such proposals might have on correctional operations. It should be noted that these proposals do not represent a government position, as no decisions have as yet been taken as to appropriate legislation. At this stage, the proposals are intended to raise issues for discussion and consultation. Rather than being committed to a particular course of action, the government is actively soliciting public and professional input to aid it in developing new correctional legislation.

The context within which these proposals have been developed is most important and is discussed in detail in the first two Working Papers of the Correctional Law Review. Two basic questions addressed in the first Working Paper, entitled *Correctional Philosophy*, are: What is the correctional system supposed to accomplish, and, how do we, as a modern society, want to go about it?

In answering these questions, the *Philosophy* paper proposes a statement of purpose and principles to guide corrections in Canada. The statement (see Appendix B) provides explicit direction to corrections as to how it is to achieve the ultimate purpose of contributing to the maintenance of a just, peaceful and safe society. It stresses the need for corrections to be integrated with sentencing policy and practice, and requires corrections to treat offenders fairly and humanely. Public protection is promoted in two ways: through the safe custody of offenders, and through active efforts of correctional staff to return offenders to the community as law-abiding citizens, always taking into account the potential risk to public safety. All correctional activities should be carried out in a manner reflecting the human dignity of all persons and consistent with the principles of restraint, fairness and openness.

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[1] With the enactment of the *Canada Act* in 1982, the *Canadian Charter of Rights and Freedoms* became part of the constitution of Canada.

The second Working Paper, entitled *A Framework for the Correctional Law Review*, examined, amongst other questions, whether inmate rights, although protected through the constitution and common law, should nonetheless be further specified in statute or regulation. The proposals made in this paper are, for the most part, consistent with current CSC policy as described in the commissioner's Directives. However, there are a number of reasons why matters governing inmate rights should now be placed in law.

One is that legislative provisions are particularly important where the *Charter* is concerned. Because the *Charter* is drafted in general, abstract terms, legislative provisions play a crucial role in articulating and clarifying *Charter* rights and any restrictions on them that are necessary in the corrections context. This latter point is most significant, as limitations or restrictions on *Charter* rights must be it prescribed by law", and it appears that limitations in policy directives are not consistent with the *Charter*'s demands.

In addition, development of legislative provisions at this time appears vastly preferable to a future of incremental and potentially inconsistent change forced upon the correctional system by the courts. Although judicial intervention plays an important role in providing outside inspection and scrutiny, the courts should be relied on as a last resort, rather than a first measure. In short, there is a need for legislative provisions to be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other, and often results in maximizing polarity.

In considering long-term solutions, the need for resort to the courts should be avoided by developing legislative rules that recognize yet structure discretion consistent with principles that are understandable to inmates, prison staff and administrators, and the public. Legislative rules that are based on clearly stated principles and objectives would structure discretion to allow for the necessary degree of flexibility while ensuring the greatest possible degree of accountability.

Development of legislative provisions to govern inmate rights and staff powers with input from all those affected by the corrections system is necessary to strike an appropriate balance. In addition, legislative rules which reflect the interests of staff, offenders, and the public are critical if they are to be fair and voluntarily complied with. It should also be noted that pro-active legislation that takes into account the administrative and resource burdens on corrections would allow inmate rights to be protected in the most cost-efficient manner.

Legislative rules help to accomplish other goals: to clearly set out the individual rights of inmates in the corrections context, and to provide guidance to staff in how to carry out their functions. Inmates should be aware of and understand the restrictions which may be lawfully imposed on them, as well as the rights and responsibilities they have, and staff must be aware of their legal responsibilities and duties and the extent of their powers. Uncertainty in the law is not conducive to either a fair or effective correctional system; it is therefore in the interests of both staff and inmates that the law clearly define inmate rights and staff powers.

The following discussion will first examine how rights are defined in the correctional context, and then examine the powers of staff. Of particular importance is the careful balancing of interests which Must take place in order to give effect to individual rights in the corrections context, while at the same time meeting the legitimate security concerns of the institution. This part will end with a discussion of the balancing process.

RIGHTS OF INMATES

It is important, at the outset, that the nature of a "right" be clearly understood. Major legal consequences are dependent on whether we are dealing with a right in the legal sense, or in the non-legal sense of a moral or social obligation. We wish to make it clear that we are discussing rights and freedoms in the legal sense - that a "right" signifies something which is legally enforceable, something which creates an inescapable legal duty or obligation on some other person, the proper discharge of which can be secured by recourse to the law and the courts or a legal tribunal set up to provide the machinery for the enforcement of the right.[2]

In these terms, inmates already have many rights. Like other persons, they are accorded constitutional rights through the *Charter*. These constitutional rights include various fundamental freedoms, as well as democratic and legal rights, which are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". As well, inmates have rights created by statute, such as the right to food, clothing and shelter, and the right to be considered for parole, provided through the *Penitentiary Act* and the *Parole Act*. The common law, in the form of judicial decisions, also operates to supplement and protect rights of inmates by imposing, for example, the duty to act fairly in certain situations. Commissioner's Directives, on the other hand, which set out policy directives in the form of rules, do not confer rights as the rules are not generally considered to be legally enforceable at the instance of an inmate. The various sources of rights and rules which currently govern corrections were examined in detail in *A Framework for the Correctional Law Review* (Working Paper #2) and therefore are discussed only briefly in this paper.

Of major significance to rights of inmates is the first principle of our correctional philosophy which states that inmates retain all the rights of a member of society, except for those that are necessarily removed or restricted by the fact of incarceration. This principle recognizes that offenders are sent to prison *as* punishment, not *for* punishment, and therefore, while in prison, retain the rights of an ordinary citizen, subject only to necessary limitations or restrictions. The view that an individual in prison does not lose "the right to have rights" is recognized in Canadian law. Even before the *Charter*, in *R. v. Solosky*,[3] the Supreme Court of Canada expressly endorsed the view that inmates retain rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognizes that any interference with inmate rights by institutional authorities must be for a valid correctional goal and must be the least restrictive means available.

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[2] For further discussion on the meaning of a right, see Hall Williams, *Changing Prisons* (1975).

In effect, the "retained rights" principle means that it is not giving rights to inmates which requires justification, but rather, it is *restricting* them which does. Undoubtedly, some individual rights of inmates, such as liberty, must be limited by the nature of incarceration, in the same way that the rights of non-inmates in open society must be limited in certain situations. The important point, however, is that it is limitations on inmate rights which must be justified, and that the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible.

There are also very significant policy reasons, flowing from our statement of purpose, for recognizing and protecting the rights of inmates. Aspects of the statement of purpose which have a major impact on how inmates should be treated include encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to incarcerated offenders which is conducive to this goal. As practically all inmates eventually get out of prison, society's long-term interests are best protected if the correctional system influences them to begin or resume law-abiding lives. According rights and responsibilities to inmates supports and furthers this goal. On the other hand, lack of respect for individual rights in the corrections context can build up resentments and frustrations on the part of inmates and undermine the system's short-term and long-term security goals. Arbitrary treatment may lead not only to resentment on the part of inmates who are sent to prison for breaking the law, but the ensuing tension could create an atmosphere of mistrust, which could lead to violence, and which is contrary not only to the interests of inmates, but to staff, management and the larger community as well.

Thus, the Working Group is firmly of the view that humane treatment of inmates and recognition of their rights while they are in prison aids in their successful re-integration into the community. While we have argued in the *Correctional Philosophy* paper that a person should not sent to prison *for* rehabilitation, we have at the same time recognized that it is the responsibility of the correctional system to actively encourage offenders to adopt acceptable behaviour patterns and to participate in education, training, social development, and work experiences designed to assist them to become law-abiding citizens.

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[3] *R. v. Solosky* (1980), 50 C.C.C. (2d) 495 (S.C.C.).

In an effort to promote this, the correctional system should provide staff selection and training that encourages dealing with problems in an innovative, humane manner; provide appropriate correctional programs; encourage bridges between the inside and outside world through strengthening contacts with family, friends and volunteers; and generally do everything possible to contribute to a stable, humane institutional environment.

Accordingly, even though the *Charter* protects fundamental rights and proscribes cruel and unusual treatment or punish - we view such constitutional standards as minimums and recognize a higher standard (a safe, healthful environment) as being more conducive to achieving the purpose of corrections.

Looking at the goal of successful re-integration of an inmate into the community in a broader fashion leads to the conclusion that it is not only the institution, but also the community which must be responsive to an individual's needs. For example, the institution can provide job skills, but society or the community must be able to provide jobs. The individual must be able to develop links with all facets of society - work, home, interpersonal relationships, etc. - and this may require structural change in society, a matter of broad social reform that is beyond the scope of correctional law and policy.

STAFF POWERS

As noted in the *Framework* paper, the rights and interests of correctional staff are key elements to be kept constantly in mind throughout the course of the Correctional Law Review. It is important to recognize two facts: that staff are as integral a part of penitentiary life as the inmates, and that no correctional system will be effective unless the rights, interests and concerns of staff are taken into account.

The job of a correctional staff member is a difficult one, often exacerbated by a misunderstanding of staff concerns on the part of inmates, management, and the public. Many issues of concern to correctional staff will be addressed in detail in a separate Working Paper devoted exclusively to them. But one issue, that of appropriate staff powers, is so closely related to inmate rights that it must be discussed here.

We wish to make it clear that for the purposes of the present discussion, the word "power" is being used not in a broad sense but in the more narrow legal sense of a specially created exception to the normal law applying to individuals. This exception enables an official such as a staff member to do something, such as search a person, which an individual is forbidden, in ordinary circumstances, to do by the civil or criminal law.[4] Because powers allow officials to do what is normally prohibited, they conflict with important individual rights ordinarily protected by law, such as the right to security of the person, privacy, and so on. It is in this sense that powers are so closely connected with rights and are therefore examined here.

"Appropriateness" of staff powers implies two things: that the powers granted to staff are necessary for the performance of their duties, and that the powers are defined in relation to the principles underlying our justice system. These principles are expressed in the *Charter*, in *The Criminal Law in Canadian Society* (*CLICS*), and in the statement of purpose and principles of corrections referred to above. As well, they are being developed in projects dealing with powers of state officials, such as the Police Powers Project of the Criminal Law Review and the FLEUR (Federal Law Enforcement Under Review) project.

The underlying theme of restraint in the *CLICS* document is of particular relevance to staff powers. The doctrine of restraint in the use of the criminal law and in the criminal justice system implies that we should incarcerate an offender in the least restrictive environment possible, and that state intervention, particularly with respect to limiting individual rights, should only be authorized to the degree necessary.

Our statement of purpose and principles of corrections is also particularly relevant in many ways. One aspect of the statement of purpose - providing the degree of custody or control necessary to contain the risk presented by the offender - recognizes the short-term security concerns in the correctional setting and the need to prevent escapes, control contraband and ensure the safety of staff and inmates, which, in certain instances, may require the use of staff powers. Other aspects of the purpose of corrections discussed above, - namely, encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to offenders which is conducive to this goal - recognize the long-term goals of the system, and that society's long-term interests would be best protected if the correctional system has the effect of influencing offenders to begin or resume law-abiding lives. Staff have a critical role to play in this regard, and in regard to the attainment of the correctional system's overall purpose and objectives.

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[4] The nature of a power is discussed further in Law Reform Commission of Canada, Police Powers - Search and Seizure in Criminal Law Enforcement Working Paper 201 (Ottawa: Supply and Services, 1983), para. 49-51 and 101-113.

Taking all the above into account, and adapting the work on powers of state officials in other criminal justice initiatives, we arrive at the following principles to guide us in defining staff powers:

1 **Staff powers should be granted by law and should be clearly defined.**

The *Framework* paper considered the question of which matters should be included in law and which could properly be left to policy directives, and concluded that staff powers should be placed in law. There are several reasons for this - accessibility and certainty of the rules relating to staff powers, the development of these rules through the democratic process, and the necessity for any provision which limits fundamental rights and freedoms to be "prescribed by law" rather than contained in Commissioner's Directives.

The concepts of accessibility and certainty of the law imply that exceptional powers should be defined clearly, both as to the actions which constitute the exercise of the power, and the circumstances under which it can be exercised.

Thus, unlike the present situation where powers are not clearly provided for but are derived from various sources including the *Penitentiary Service Regulations*, the Commissioner's Directives, the *Criminal Code* and the common law, correctional legislation should contain a clear framework of specific procedures which is accessible to all.

2 **The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.**

Specific enforcement powers may only be justified if they can be shown to be necessary in the carrying out of the agency's mandate. Thus a reasonable approach to defining powers is to first determine the agency's mandate, then decide what activities are necessary to achieve the mandate, and finally what powers are necessary to successfully carry out the activities. The mandate of the Correctional Service of Canada (CSC) and the powers necessary to carry it out are examined in detail in the Working Paper on *Powers and Responsibilities of Correctional Staff*. We have drawn heavily on this work in defining staff powers as they relate to inmate rights in parts of the present paper such as in regard to search of inmates.

Another aspect of this principle, linking the granting of powers to specific purposes, implies that there should be no general granting of powers. If the powers granted do not coincide with the mandate of the agency, then either the power is not used and its granting is therefore unnecessary, or else it is used by staff to perform an activity for which they have no clear mandate. Granting exceptional powers to officials which are not necessary to the successful performance of their mandate is incompatible with the principle of restraint, one of the cornerstones of our criminal justice policy.

3 **In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.**

As discussed in the *Framework* paper, in order to promote voluntary compliance with the law, we must take into consideration not only the competing interests in corrections but the point at which interests overlap and converge. That Working Paper noted that there is a shared interest of staff and inmates in having a predictable, secure and smooth-running institution. Although extensive use of coercive powers of staff might achieve a secure institution in the narrowest sense of the word, it would undermine the ultimate purpose of corrections. In determining the extent and scope of staff powers, we must be mindful of the fundamental rights and freedoms of offenders, and only limit these to the extent necessary to ensure that security is maintained and human health and safety are not put at risk.

4 **To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.**

There are several reasons why controls should be placed on the exercise of staff powers. First, powers are by their nature coercive, that is, they authorize normally prohibited conduct which affects such rights as liberty, privacy, and bodily integrity. Second, the exercise of staff powers may involve a large degree of discretion on the part of the individual officer. In order to reduce arbitrariness and inconsistency in the exercise of powers, standards must be set to give guidance to staff and to structure their discretion.

Traditionally, police powers have been controlled in several ways, for example, by the requirement of prior judicial authorization for certain powers such as search and by the requirement of a high standard of belief that an offence has been committed before the police have the power to search or arrest. In the correctional context it is unrealistic to require prior judicial authorization for routine, non-intrusive searches, but it may be appropriate to require authorization by the institutional head for certain types of searches. As well, an objective standard of reasonableness should be a requirement in the exercise of all staff powers. The appropriate reasonableness standard for the corrections context will be discussed further in the section in Part I on search of inmates.

Another important goal in the development of staff powers is ensuring that accountability mechanisms are in place, to encourage substantial compliance by those exercising the powers.

5 **Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.**

This principle is derived from the doctrine of restraint. The use of force may be justified in exercising a power in certain situations but criminal justice policy requires that this be the minimum possible in the circumstances. As well, it is necessary to ensure that fair and effective remedies are available to inmates for excessive use of force.

BALANCING INMATE RIGHTS AND INSTITUTIONAL CONCERNS

Our task in arriving at the proposals for possible inclusion in law contained in this paper was to carefully balance the various rights and interests at stake in order to determine what should be set out in law. Starting with the retained rights principle, the exercise was essentially to determine what limits on rights were necessitated by the fact of incarceration, and from there, the least restrictive means of limiting them, and, as well, the safeguards that should be specified. In the balancing process, we relied on the approach of the courts, in *Solosky* and in *Charter* cases, as our starting point in analyzing the scope and substance of inmate rights and staff powers in relation to particular activities.

It is important to remember that, despite the focus on the *Charter*, if the activity or practice is not covered by the *Charter* this does not mean that any individual rights or interests affected are not or should not be protected under law. Even if not covered by the *Charter* they may still be created, protected, and limited by other means, such as through the common law, legislation, or regulations. In regard to tests developed by the courts in relation to the *Charter*, if the court determines that particular conduct or an activity does affect rights protected by the *Charter*, it then goes on to determine the extent of protection given by the *Charter* in the circumstances of the case.

In doing this the Supreme Court relies on what it terms a "purposive" analysis; this means it considers the "purpose" of protecting the right in the *Charter*. In effect, the courts consider the purpose of the guarantee "in light of the interests it was meant to protect", and this is determined by several factors identified by the Supreme Court:

1. the "character and larger objects of the *Charter* itself";
2. the language of the right in question;

3 the "historical origins of the concepts enshrined";

4 and, where applicable, to the "meaning and purpose of the other specific rights and freedoms with which it is associated within the text...."[5]

Therefore, in regard to search and seizure, for example, the courts first looked at the purpose of protecting a right to be secure against unreasonable search and seizure, and determined that it was basically to protect the right to privacy. Thus, even though privacy is not specified in the *Charter*, it is protected.

Once the purposive analysis is completed, and the need for any safeguards is established, the court must deal with arguments concerning limitations. *Charter* rights can be limited subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", according to the limitation clause in section 1 of the *Charter*.

In a series of cases dealing with such diverse areas as immigration and narcotic control, the Supreme Court of Canada has set the test for limits on *Charter* rights. This test is extremely important for corrections, as it is at this stage that such serious concerns as security and good order of the institution will be balanced against the guarantee of *Charter* rights. The Supreme Court stresses that in applying this test it is committed to upholding *Charter* rights, and that any limits on *Charter* rights must be proven by the government to be necessary, and not just preferable as a matter of administrative convenience.[6]

The court set out the strict test to be met before *Charter* rights could be limited in *R. v. Oakes*.[7] Two central criteria must be satisfied to establish that a limit is reasonable and justified under section 1. First, the objective to be served by any measure limiting a *Charter* right (for example, security of the institution) must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Second, the party invoking section 1 (in the corrections context, this would be the government for the correctional authorities) must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test that has three components:

1 the measure must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it;

2 the means should impair the right in question as little as possible; and

3 there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

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[5] *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 (S.C.C.).

[6] *Singh et al v. Minister of Employment and Immigration et al* (1985), 58 N.P. 1 (S.C.C.).

[7] *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, p. 347-350.

This proportionality test shows that protection of inmate rights must be balanced against the important and legitimate institutional and security concerns of penitentiaries and the community; concerns that in several respects relate to human life and safety. Such factors play an important role when it comes to the question of the extent to which inmate rights may be restricted or limited by the nature of incarceration. The answer to this question is complex and depends not only on security concerns but also on the nature of the particular right or interest at stake, the limit in question, and the impact on the inmate.

Of major significance in balancing the various factors involved is the recognition that prison practices and programs vary in degree of intrusiveness on inmate rights, and that as the level of intrusiveness increases, the objective must be increasingly important and protections and safeguards must correspondingly increase. Finding the proper balance necessary to protect inmate rights while maintaining a safe, secure institution through a sliding scale approach is one of the primary concerns of this paper.

In both the *Framework* paper and in the Introduction to this paper we have explained our essential task as being the balancing of the interests of staff, inmates and the public. The next part of this paper represents an attempt to implement this approach in provisions governing the operation of federal penitentiaries, for example, in relation to inmate transfer, mail, visiting, segregation, discipline and search. These proposals are presented to generate discussion prior to the development of recommendations to the government.

These and other areas have been selected because of their critical nature, yet the list is not comprehensive; due to considerations of length not every area of inmate rights has been included in this paper. We feel, however, that the areas covered will serve to demonstrate the approach in all areas. In developing the proposals which follow, we have analysed both the nature of the inmate's interest in retaining certain rights and freedoms, and have also analysed the specific security and other institutional concerns. Even though it is a relatively simple matter to state our basic premise, that is, that "offenders retain all rights, subject to any limitations necessitated by the fact of incarceration", it is much more difficult to determine what, in practice, are the necessary limitations on specific rights which arise from the fact of incarceration. The proposals for consideration are an attempt by the Working Group to balance the competing interests, and the commentaries explain how the various factors which we think are relevant were weighed. During the to which we have captured all the factors relevant to a particular area, as well as whether we have given appropriate weight to these factors.

Proposals for discussion, with commentary, are presented in the next two sections of this paper. Part I deals with correctional practices that affect rights retained by inmates. Part II sets out proposals in regard to rights which inmates derive from their status as inmates, such as the right to basic amenities of life. In Part III, common issues and concerns that arise in enforcing rights in an institutional context are examined. Judicial remedies that should be available to inmates who feel that their rights have been infringed or denied are first considered, followed by a discussion of other avenues, such as inmate grievance procedures and the correctional investigator.

In most cases, the proposals in Parts I and II are consistent with present CSC policy found in the Commissioner's Directives (CDs) and, except where noted, their implementation would likely not greatly affect operations. The Directives have recently been revised and updated to reflect the Service's mission statement. This approach is intended to ensure that the responsibilities of the corrections system are carried out in a coordinated way through services based on common principles. As well, it flushes out the limited guidance provided by present correctional legislation. We are of the view, however, that the current skeletal legislation provides insufficient guidance with respect to inmate rights, and for the reasons set out above, it is critical that inmate rights be further specified in law.

In developing the proposals for possible inclusion in law we have been particularly mindful of the dangers of over-legislating. We recognize that a certain level of discretion is desirable to allow officials the degree of flexibility necessary to respond to the widely varying circumstances of individual cases. However, serious concerns have been expressed about the lack of accountability or controls associated with much of the discretion in our corrections system, and the unintended and undesirable consequences which arise as a result.[8] The real dilemma over discretion stems from the fact that it may be seen at the same time as harmful and helpful. In the former case, discretion is regarded as a threat to individual rights; in the latter, as the necessary means to achieve flexibility. One of the most difficult tasks in developing these proposals for possible inclusion in law is ensuring that the rules are balanced to permit the necessary degree of flexibility while providing the greatest possible degree of accountability. Whether this has been achieved will no doubt be the subject of much discussion during our consultations on this paper.

STATUTE OR REGULATION

It should also be noted that we have not at this stage distinguished between legislative provisions which should be contained in a statute, and those which are more appropriately a matter for regulations. Considering the relative ease with which regulations may be changed, they are a much more suitable vehicle for matters which are likely to change most frequently. Nor have we at this stage drafted the proposals in the precise language which will be necessary for legislation. The focus at this point is on the substantive issue of "what should be set out in law", rather than on questions of formal drafting and the details that should be in regulations as opposed to a statute. However, these questions should be kept constantly in mind when considering all the provisions set out in this paper.

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[8] Discussed in *A Framework for the Correctional Law Review*, [Working Paper No. 21 (Ottawa: Solicitor General Canada, 1986)

PART I: RETAINED RIGHTS

FAIRNESS IN INSTITUTIONAL DECISION-MAKING

Even though the meaning of procedural fairness in regard to decision-making has been the subject of considerable litigation, it may be looked at in simple terms as consisting of two essential elements: the right to know the case against you, and the right to be heard or present your case. These two basic rights underlie the discussion and the proposals for consideration in this section. The important questions to be answered are: whether procedural protections are required in a particular situation and, if so, the extent or scope of the requirements. What is required in a given situation is determined by a number of factors identified by the courts over the past fifteen years.[9]

The courts have developed a spectrum approach which means that fairness is always required in a decision-maker whose decisions affect the liberty of subjects, but the extent of procedural protections may vary depending on the exigencies of the case, having regard to such factors as the significance of the consequences to the individual and the administrative constraints of the decision-maker.[10] This recognizes one of the important aspects of fairness, its fluid quality. Fairness varies from one situation to another; it may require a full-fledged hearing in one situation, and in another, mere notice of allegations and an opportunity to respond in writing. One factor which the courts stress is the likelihood of a significant adverse impact or loss to the inmate in a particular case. The courts are using the spectrum approach in the sense of a sliding scale to balance the impact or intrusion on the inmate with the degree of protection to be accorded.

Even though procedural protections associated with the duty to act fairly were in place prior to the *Charter*, with the advent of the *Charter* in 1982 the issue of the relationship between "principles of fundamental justice" in section 7 of the *Charter* and the common law "duty to act fairly" emerged. Section 7 guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

One major distinction between the two standards of fairness stems from the different legal nature of a constitutional provision on the one hand, and a common law entitlement on the other: the *Charter*, being part of the constitution, supercedes legislation, whereas the common law duty to act fairly is subject to the will of Parliament.[11]

The issue of the scope of fundamental justice has been considered by the Supreme Court of Canada on a number of occasions and their decisions support the view that the requirements of section 7 of the *Charter* exceed those imposed by the common law fairness doctrine.[12] The Court adopts the position that the principles of fundamental justice include, *at a minimum*, procedural fairness and that procedural fairness demands different things in different contexts. However, the court has also indicated, in what may prove to be a significant expansion of their scope, that the principles of fundamental justice are not limited to procedural guarantees, implying that they have substantive elements as well.

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[9] The development of case-law in regard to the duty to act fairly is traced in the *Framework* Paper, supra, note 8, p. 5-12.

[10] The spectrum approach is discussed further in Fergus O'Connor, "The Impact of the Canadian *Charter* of Rights and Freedoms on Parole in Canada", *Queen's L.J.* 336, at p. 348.

[11] Discussed, ibid.

The role of the courts in requiring that penitentiaries treat inmates fairly in making decisions concerning their liberty was reflected in the simultaneous treatment of three cases by Supreme Court of Canada in December, 1985.[13] The Court dealt with largely procedural questions relating to inmates' access to the *habeas corpus* remedy in a manner which reaffirms recognition of inmate rights, in this case of rights to "residual liberty" in regard to placing inmates in administrative segregation and special handling units. Characterizing such practices as creating "a prison within a prison", the Court held that even though inmates have a limited right to liberty, they must be treated fairly in regard to any limitations on the liberty they retain as members of the general prison population. As with all individuals, inmates have the right to be treated fairly in regard to any decision affecting them. It is in this sense that "fairness" is a retained right that inmates share with all members of society.

In the next section we set out for discussion both general and more specific provisions in the areas of transfer and administrative segregation that have been developed in light of the spectrum approach outlined above. The development of these proposals for possible inclusion in law serves as a model for provisions governing other decisions, such as institutional placement and temporary absence decisions, which also affect an inmate's liberty and other interests.

These provisions are designed to structure discretion in an effort to promote fair and effective decision-making; both by providing clear objectives and criteria, as well as through procedural protections.

An important question in regard to institutional decision-making which remains to be addressed, however, is *who* should make such decisions. Should they be made by the person with ultimate responsibility within the institution, that is, the institutional head or his or her designate, or should they be made by an independent person or body?

Some critics would argue that prison administrators are necessarily much more concerned with immediate short-term issues involved in maintaining an orderly institution than with the long-term goals of re-integration of individual inmates, and that this will inevitably, and sometimes inappropriately, influence their decisions. This has already been recognized in the context of the inmate disciplinary process, where decisions concerning serious and intermediary disciplinary offences have been taken out of the hands of the institutional head and given to independent chairpersons. It has been suggested that decisions regarding other aspects of incarceration, for example, those affecting an inmate's liberty, such as transfer and administrative segregation, would also be better dealt with by an independent person or body. Suggested alternatives range from an extension of the independent chairperson's role, to the establishment of a judicial official similar in capacity to the "juge de l'application des peines" (JAP) which operates in the French system to manage the administration of the sentence handed down by the court.

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[12] Sinqh, *supra*, note 6, and *Reference re Section 94(2) of the BC Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[13] *Morin v. National Special Handling Unit Review Committee et al*; *R. v. Miller*; and *Cardinal et al v. Director of Kent Institution*; [1985] 2 S.C.R. 613 *et seg*.

The literature suggests, however, that many problems are still unresolved in regard to "independent" decision-makers.

For example, the JAP, as a member of the judiciary, is in theory independent. In practice, however, a lack of adequate resources has forced him to be dependent on the information and recommendations of the institutions. Consequently, the JAPs are frequently viewed as "rubber stamps."

Our main concern is to promote an environment where the best possible decisions are made, whether by institutional management or some other person or body. In the proposals which follow we have specified that the institutional head is the decision-maker (with the exception of the independent chairperson for certain disciplinary proceedings). However, we ask the reader to consider whether any of the decisions would be better made by a more independent decision-maker, and if so, by whom.

A) GENERAL PROVISIONS FOR FAIRNESS IN INSTITUTIONAL DECISION-MAKING

Objective

1 **To ensure that the requirements of procedural fairness are complied with in decisions affecting an inmate's liberty or other interests.**

General Rule

2 **When making a decision which affects the liberty or-other rights or interests of an inmate, the institutional-authorities shall ensure that the greater the impact on the inmate the greater the procedural protections provided.**

Inmate Access to information

3 **Where a decision affects an inmate's liberty or other-interests, the inmate shall be entitled to all information-which is relevant to his or her case. However, where the-decision-maker receives information which**

- a) **could reasonably be expected to threaten the safety of individuals;**

b) could reasonably be expected to be injurious to the security of penal institutions; or

c) could reasonably be expected to be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the *Penitentiary or Parole Acts*, or the *Penitentiary Service or Parole Regulations*,

it need not disclose the information, if after

i taking all available steps to confirm the accuracy of the information;

ii considering the effect of disclosure on the source of the information or on a third party, or on an ongoing investigation or review; and

iii considering the impact of non-disclosure on the applicant's opportunity to respond to matters at issue

it is satisfied that the information should not be disclosed.

4 Where information is not disclosed pursuant to section 3, the inmate shall be provided with specific reasons or grounds for non-disclosure and with the gist of the information.

COMMENTARY

The objective and general rule regarding fairness in decision-making has been specifically set out to ensure that all decision-making is consistent with the "spectrum" approach discussed above. The goal is to ensure that the greater the degree of liberty or other interest at stake, and therefore the greater the impact on the inmate, the greater the requirement for procedural fairness. More specific instances of what this general rule means in a particular situation may be seen in the provisions regarding transfer and administrative segregation, which follow.

The provision concerning an inmate's access to information reflects an essential element of fairness: that the person concerned have access to all information that the decisionmaker may be using in coming to a decision. This allows the person to respond intelligently to the information, and either attempt to correct any mistakes or give an explanation if one is required.

Although the criteria for withholding information are narrower in certain respects than present CSC policy,[14] the provisions are consistent with case-law in particular, with the principle enunciated in *Re Cadieux and Director of Mountain Institution*.[15] In that case the Federal Court, Trial Division held that because of the liberty interest protected by s.7 of the *Charter*, the general rule is that an inmate or parolee must be advised of the information being used in a decision (in this case, in regard to conditional release). The Court went on to say that in very rare cases, where there is a strong competing public interest in nondisclosure, the inmate or parolee is entitled to at least the "gist" of the information. The provision uses an "injury test" to set out the situations where public interest overrides disclosure. According to this test, it must be shown that disclosure would cause harm in the sense of threatening individual safety, or injuring the security of the institution. Where this is determined, however, the inmate should receive the "gist" of the information, which should be enough to enable him or her to respond. As noted by the Federal Court of Appeal in *DeMaria*, the authorities are entitled to protect confidential sources of information, but "it should always be possible to give the substance of the information while protecting the identity of an informant. The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose."[16]

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[14] Commissioner's Directive No. 095, entitled *Information Sharing*, provides as follows:
CRITERIA FOR SHARING INFORMATION WITH OFFENDERS

It should be noted that the access to information provisions go beyond the present law in that they relate not only to an inmate's liberty, but also to his or her "other rights and interests". Thus, where a decision is made, for example, to restrict an inmate's visits, the inmate would, under the provision, be told why.

In other instances decisions relate more to management of the institution as a whole rather than to the conduct of an individual inmate. Yet, here again, the reasons for such decisions should be given to individuals affected. Therefore, where a decision is made, for example, to close the gym for repairs, the reason should be given. This approach promotes an environment in which people affected know what's happening and why, unless of course there's a valid reason for withholding an explanation.

B) PROVISIONS RELATED TO TRANSFER OF INMATES

Objective

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(4) As a general rule, staff members are obliged to share with the offender information that is relevant to his or her case. Staff members should refer to established guidelines for particulars.

(5) Exempted from the obligation to share with the offender are types of information which may not be disclosed on grounds of the public interest, including information of which the disclosure:

a. could reasonably be expected to threaten the safety of individuals;
b. could reasonably be expected to lead to the commission of a crime;
c. could reasonably be expected to be injurious to the security of penal institutions;
d. could be injurious to the physical or psychological health of the offender; or
e. could be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the *Penitentiary* or *Parole Acts*, or the *Penitentiary Service* or *Parole Regulations*, including any such information that would reveal the source of information obtained in confidence.

[15] *Re Cadieux and Director of Mountain Institution* (1934), 13 C.C.C. (3d) 330 (F.C.T.D.).

[16] *DeMaria v. Regional Classification Board and Payne* (1987), 30 C.C.C. (3d) 55 (F.C.A.).

1 **To meet the security requirements and program needs of individual inmates while recognizing the impact of a transfer decision on an inmate's liberty and other interests.**

Authority

2 **The Commissioner or any officer directed by the Commissioner may transfer an inmate in accordance with the provisions of this part.**

Reasons for Transfers

3 **The transfer of an inmate may take place for one or more of the following reasons:**

- **a) to respond to reassessed security requirements;**
- **b) to provide access to the home community or a compatible cultural environment;**
- **c) to provide access to relevant programs;**
- **d) to provide adequate medical or psychological treatment;**
- **e) to provide adequate protection;**
- **f) to relieve serious overcrowding; and**
- **g) to respond to an inmate's application for transfer.**

Involuntary Transfers

4 **Before being transferred involuntarily, an inmate shall be informed, in writing, of the proposed involuntary transfer and the particular allegations on the basis of which the transfer is being proposed, and of the fact that he or she is entitled to respond to the proposal, in person before the institution head, or, if the inmate prefers, in writing, within 48 hours.**

5 **The inmate's response to a proposal of involuntary transfer shall be reviewed by the Commissioner or a senior regional official and the inmate shall be informed of the decision reached. When the involuntary transfer is to proceed despite the inmate's objection, reasons for the decision shall be given.**

6 **In an emergency situation, a transfer may take place without prior notification to the inmate. In such cases, the inmate shall be informed of the reasons for the transfer and the particular allegations on which it is based within 48 hours of the transfer and shall have the opportunity to respond, in person, within 48 hours.**

COMMENTARY

Inmates are often moved from one location to another in serving their sentences depending on their security status, program and treatment assignments, and the administrative exigencies of the correctional service. Decisions to transfer between penitentiaries may be initiated by an inmate's application for transfer or by the institutional authority. The provisions for possible inclusion in the law set out above relate mainly to involuntary transfer of an inmate at the instigation of the institution. They would normally not be applicable to gradual release and "cascading", which imply progressive transfers of inmates to lower security as their release dates approach. Statutes, agreements and treaties provide for transfers between jurisdictions including provincial correctional authorities, provincial psychiatric or medical facilities and foreign correctional authorities. Offenders serving parole or mandatory supervision may also transfer to different district office locations. This discussion will, however, be limited to an examination of domestic transfer of an inmate from one penitentiary to another.

According to the Reports of the Correctional Investigator, by far the majority of complaints received from inmates have to do with institutional transfers. Inmates complain that they are involuntarily transferred to more restrictive institutions, often with less access to programs and facilities, or to institutions thousands of miles away from their home communities without adequate notice, reasons, or a chance to respond. Even though CSC has recently changed its policy in regard to inter-regional transfers, its efforts to deal with this problem have resulted in another problem - overcrowding in some areas.

As a result of investigations of these complaints the Correctional Investigator has made several recommendations calling for procedural safeguards for involuntary transfers between institutions. Moreover, the courts, in dealing with transfer cases, have recognized that transfers from open to close or closer custody can certainly engage the provisions of the *Charter* dealing with fundamental justice (s.7), arbitrary detention and imprisonment (s.9), and cruel and unusual treatment or punishment (s.12). In light of the significant rights and interests at stake, it is most important that safeguards be clearly set out in law. Current provisions in legislation and regulations fall far short in this regard.

Institutional transfers are presently authorized by subsection 13(3) of the *Penitentiary Act* which provides that once an inmate has been sentenced or committed to a federal penitentiary, the Commissioner or any officer directed by him may direct the transfer of an inmate to any penitentiary in Canada. The *Act* does not set any guidelines to govern transfers but section 13 of the *Penitentiary Service Regulations* provides that an inmate shall be confined in the institution that "seems most appropriate", having regard to the degree and kind of custodial control considered necessary or desirable for the program of training considered most appropriate for the inmate.

Commissioner's Directive No. 540 sets out the transfer procedure. Section 13 of the Directive prescribes that an inmate is entitled to be informed, in writing, of a proposed involuntary transfer and the reasons for it and of the fact that he or she has the opportunity to respond to the proposal, in writing, within 48 hours. Written reasons for the final decision to proceed are to be supplied to the inmate.

The courts have tended in the past to defer to the decisions of prison administrators with respect to transfers of inmates. Courts in Canada are now taking a more active role in reviewing transfer decisions, particularly where an inmate is transferred to another region or to a higher security institution. Courts are being more receptive to claims concerning qualitative differences in amenities between institutions and have considered such factors as an inmate's loss of ability to receive visits from family, loss of opportunities to participate in various programs and receive medical treatment and jeopardy to parole status in imposing procedural safeguards on transfer decisions. The courts have required the principles of fundamental justice where the right to liberty under the *Charter* is affected:

> In light of the well founded notion of "a prison within a prison", transfers from open to close or closer custody can certainly engage the provisions of sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. The decision to effect such an involuntary transfer, without any fault or misconduct on the part of the inmate, as it is abundantly clear was done in the applicant's case is the quintessence of unfairness and arbitrariness.[17]

The proposals for possible inclusion in law are intended to provide these safeguards recognizing that an inmate has the right to notice, to information concerning allegations supporting the transfer, and an opportunity to respond to them in person. This opportunity for the inmate to appear personally represents the main change in practice, and therefore, we wish to receive comments as to its possible impact and whether it is an appropriate addition to the process. The major justification for such a change is the fact that significant rights and interests are affected, and a hearing is in line with the demands of the principles of fundamental justice. Also to be considered is the fact that a hearing would avoid possible difficulties that inmates may have in expressing themselves adequately in writing, compared to the relative ease with which correctional authorities can meet with an inmate to discuss his or her case. In a certain sense, a hearing avoids the demands of a formal, written procedure, although at the same time it could be quite time consuming and administratively burdensome for CSC. We point out, as well, that in case of an emergency, the inmate would be given reasons and an opportunity to respond after-the-fact. This latter point is consistent with present CSC policy and also reflects case law which holds that fairness does not entitle the inmate to prior notice of the decision to transfer if an emergency situation has arisen in the prison.

It is, however, necessary that reasons and an opportunity to respond be provided as soon as possible after the transfer. In our proposals we have suggested an in-person hearing because of the liberty interest at stake; this goes beyond the present policy allowing for written responses.

C) PROVISIONS RELATED TO ADMINISTRATIVE SEGREGATION

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[17] *Hay v. National Parole Board* (1985), 13 Admin. L.R. 17 (F.C.T.D.), at p. 27.

Objective

1 **To ensure that inmates who must, for a limited period of time, be kept from associating with other inmates are confined as a result of a fair and reasonable decision-making process, in a secure and humane fashion, and returned to normal association as soon as possible.**

Placement in Segregation

2 **An inmate may be segregated where the institutional head or his or her designate is satisfied that no other reasonable alternative exists, and:**

a) **there are reasonable grounds to believe that the inmate has committed, attempted to commit, or plans to commit acts that represent a serious threat to the security of the institution or the safety of individuals; or**

b) **disciplinary or criminal charges have been laid involving actual or threatened violence or an associated threat of reprisal or destruction of government property and there is a substantial likelihood that the offence will be continued or repeated or there will be violent reprisals by other inmates;**

c) **there are reasonable grounds to believe that the presence of an inmate in normal association would interfere with the investigation of a criminal or serious disciplinary offence through that inmate's intimidation of potential witnesses; or**

d) **there are reasonable grounds to believe that an inmate's presence in normal association represents a risk to the good order of the institution in that the inmate has refused to obey the lawful order of a staff member or officer and there is a substantial likelihood that the refusal will be repeated or will lead to widespread disobedience by other inmates; or**

e) **there are reasonable grounds to believe that the inmate's life is in danger.**

3 An inmate placed in administrative segregation shall be informed, in writing, of the reasons for the placement in segregation within 24 hours of placement.

4 Where an officer other than the institutional head has ordered administrative segregation, the institutional head shall, within 24 hours of placement, review the order and either confirm the placement in segregation or issue a further order directing that the inmate be released from segregation.

Conditions of Confinement

5 An inmate placed in administrative segregation shall not be considered under additional punishment and shall be accorded the same conditions of confinement and rights and privileges as the general population except for those that can only be enjoyed in association with other inmates, including but not limited to

a) correspondence;

b) personal effects;

c) clothing, bedding, and linen and exchange thereof;

d) personal hygiene, including opportunities to shave and shower;

e) canteen;

f) borrowing from the institutional library and receiving reading material from outside the institution;

g) access to legal materials and legal services; and

h) daily exercise.

Reasonable access to visits and telephone calls to persons or agencies outside of the institution shall be provided.

6 Inmates who have been placed in administrative segregation shall be provided with:

a) case management services;

b) educational, spiritual and social development activities;

- c) psychological counselling; and
- d) administrative and health care services.

Review of Administrative Segregation

7 a) A review of the case of each inmate placed in administrative segregation shall take place within 3 days of the initial placement and no less frequently than once a week thereafter.

b) The review shall be carried out by a Segregation Review Board consisting of the Assistant Director (Security) or Assistant Director (Socialization); the Classification Officer or psychologist in charge of segregation; the security officer in charge of segregation; and an independent outside person.

c) Each inmate shall be notified at least 24 hours in advance of the review and shall be permitted to present his or her case in a hearing before the Segregation Review Board.

d) The board shall consider whether there are continuing grounds for segregation according to the criteria in section 2 and shall recommend in writing to the institutional head either that segregation be continued or that the inmate be returned to the general population.

e) A copy of the recommendation shall be given to the inmate.

f) The institutional head retains the final authority to make the decision (subject to 8(b)). In a case where the institutional head does not intend to act in accordance with the recommendation of the Board that an inmate be returned to the general population, the institutional head shall inform the inmate in writing of the reasons for his or her intended decision and provide the inmate with an opportunity to present his or her case for release into the general population.

g) Where the inmate continues to be segregated, the Segregation Review Board shall develop a plan to re-integrate the inmate into the general population of the institution as soon as possible, and shall monitor the plan during subsequent reviews. The inmate shall have an opportunity to make representations as to the proposed plan.

8 a) Where segregation is to be continued beyond 30 consecutive days the Segregation Review Board shall hear the evidence of a psychologist or psychiatrist who has assessed the inmate.

b) Where the psychologist or psychiatrist presents evidence that continued segregation will cause the inmate substantial psychological or physical harm, the institutional head shall order the inmate's return to the general population, unless return would be an immediate danger to life or safety.

Maximum Time in Administration Segregation

9 No segregation shall be continued for more than ninety days unless

a) during this period the inmate commits further acts which under section 2 justify further segregation. Any further period of segregation shall also be subject to a ninety day limitation; or,

b) no reasonable alternative exists and the inmate must remain in the institution to attend court proceedings.

COMMENTARY

Segregation, the "hole", and solitary confinement are all terms used to describe the dissociation of inmates from the rest of the prison population. Dissociation falls into three broad categories. The first category is the equivalent of protective custody whereby an inmate is segregated for his own protection. This form of dissociation is usually entered into at the inmate's own request, and will not be discussed here. Of more relevance to this examination of inmate rights are the other two categories of dissociation - punitive dissociation and administrative segregation.

Punitive dissociation is authorized by section 38 of the *Penitentiary Service Regulations* which provides that an inmate found guilty of an intermediary or a serious misconduct is liable to dissociation for a period not exceeding thirty days. Issues arising in connection with punitive dissociation will be examined under Inmate Discipline. However, for comparative purposes, it is interesting to note here that before an inmate may be dissociated as a punitive measure several procedural hurdles must be met. The inmate must first have been convicted and sentenced by a disciplinary board at a hearing. Entitlement to a hearing carries with it many corresponding rights such as the right to be fully apprised of the charges being faced, the right to present evidence, the right to cross-examine wilnesses (through the independent chairperson), and in certain instances, the right to be represented by counsel. Furthermore, the term off dissociation which may be imposed is of a certain and limited duration (although consecutive sentences can be imposed in multiple count situations).

By way of contrast, no similar procedural safeguards are set out as being applicable to administrative dissociation. An inmate may be placed in administrative segregation under section 40 of the *Penitentiary Service Regulations* which provides:

> 40(1) Where the institutional head is satisfied that
>
> a) for the maintenance of good order and discipline in the institution, or
> b) in the best interests of an inmate it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of each inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should be returned to association with other inmates.
>
> (2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived of *any* of his privileges and amenities by reason thereof, except those privileges and amenities that
>
> a) can only be enjoyed in association with other inmates, or
> b) cannot reasonably be granted, having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

Unlike punitive dissociation, there is no set limit on the length of time an inmate may be segregated. This fact, coupled with the relative absence of procedural safeguards, renders administrative dissociation an easy target for abuse. As noted by the John Howard Society:

> [N]o allegations need be made, no evidence offered, no reasons given. Because there is nothing to answer, the inmate does not receive a hearing. It is possible for an inmate to spend every day of his penitentiary life in dissociation on the basis of an original decision made by the director ....[18]

Although administrative dissociation is undoubtedly necessary in certain situations, it must be recognized that it is a tool which may, in practice, be used for punitive purposes.

It may, for example, be used where inmates suspected of having committed disciplinary offences are placed in administrative segregation rather than being charged and tried in accordance with disciplinary procedures which may or may not result in punitive dissociation. In this manner, inmates may be punished for suspected offences without a trial or hearing and segregated for a term far exceeding that permitted under the current punitive dissociation provisions. Moreover, cases have come to light where inmates were kept in segregation to encourage them to plead guilty to disciplinary charges. In addition, inmates have been placed in administrative dissociation indefinitely following the expiry of a finite period of punitive dissociation.[19]

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[18] Submission of the John Howard Society of Ontario, *Penitentiary System in Canada*, p. 91. Cited in R. Price, "Doing Justice to Corrections" (1976-77), 3 *Queen's L.J.* 214, at p. 277.

Since administrative segregation is an area which is lacking in statutory or regulatory procedural requirements, and which significantly affects rights to liberty and freedom of association, it is not surprising that this is an area in which inmates have turned to the courts in an attempt to clarify what rights they have and to seek remedies for what they perceive as unjust treatment.

In *McCann v The Queen*,[20] a pre-*Charter* case, inmates successfully argued that the dissociation conditions in the (now closed) British Columbia penitentiary constituted cruel and unusual punishment contrary to the *Canadian Bill of Rights*. McCann himself had spent a total of 754 days in administrative segregation between July 1970 and August 1972, in conditions which required, amongst other things, that each inmate be confined to a small cell with a light burning 24 hours a day, to sleep with their heads next to the toilet, and to be subjected to strip searches in the open. Although the Federal Court found that conditions such as these constituted cruel and unusual punishment, it did not, at this early stage in the evolution of inmate rights, go so far as to require due process in decisions concerning dissociation. This situation has, however, been changed in recent cases by the Supreme Court of Canada, as discussed below.

In *Re Cardinal and Oswald and The Queen*,[21] the applicants were kept in administrative segregation pending the disposition of charges relating to an alleged hostage-taking incident notwithstanding that the Segregation Review Board had recommended that they be released. The Director had not investigated the allegations and the inmates had been given no opportunity to present their side of the story. At the lower court level, in the course of deciding whether the Director had treated the inmates fairly, the Court concluded essentially that since no procedural standards existed, it could not be said that the duty of procedural fairness had been breached.[22] In the absence of evidence of bad faith, judicial review was unavailable. This decision was, however, overturned on appeal. The Supreme Court of Canada recognized administrative segregation as "a form of containment involving severe restrictions on mobility, activity, and association".[23] It went on to equate confinement in administrative dissociation or segregation with that in a special handling unit, stating that "both are significantly more restrictive and severe forms of detention than that experienced by the general inmate population".[24]

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[19] Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983), p. 63.

[20] *McCann v. The Queen* (1976), 29 C.C.C. (2d) 377. This case forms the centre-piece of Michael Jackson's study of solitary confinement in Canada, ibid.

[21] (1982), 67 C.C.C. (2d) 252 (B.C.C.A.). Reversed on appeal to the Supreme Court of Canada, *supra*, note 13.

[22] *Ibid.*, (B.C.C.A.), at p. 259.

[23] *Ibid.*, (S.C.C.), p. 4.

Because of the significant impact administrative segregation can have an an inmate, the Supreme Court of Canada held that the institutional head is under a duty of procedural fairness. The Court basically extended the duty of procedural fairness which has been held to apply to disciplinary proceedings within a penitentiary since *Martineau (No.2)* to decisions concerning administrative segregation:

> The duty of procedural fairness has been held to apply in principle to disciplinary proceedings within a penitentiary, and although administrative segregation is distinguished from punitive or disciplinary segregation in the *Regulations*, the effect on the prisoner is the same and gives rise to the duty to act fairly.[25]

Cardinal and Oswald is also important in regard to remedies. The Supreme Court of Canada held that *habeas corpus* lies to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found to be unlawful, to order the inmate's release into the general population of the institution. In effect, this means that the breach of the duty of procedural fairness is of sufficient consequence to render the continued segregation of the inmates unlawful, even if it seems that had a hearing teen held, the decision to segregate or to continue segregation would have been justified. In strong terms, the Supreme Court of Canada reaffirmed the importance of an inmate's right to a fair hearing:

> The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[26]

The proposals for discussion set out above are intended to meet the serious shortcomings and potential for abuse of the present administrative segregation scheme. These proposals have been developed to provide a statutory framework for a system that would be fair and reasonable for inmates without compromising the institution's obligation to provide safety and security to staff, other inmates, and the public, and programs to all inmates, including those dissociated.

The proposals attempt to clarify the criteria for placement in administrative segregation and to avoid broadly worded tests such as "for the good order of the institution". Included in the criteria is 2(e) which relates to a situation where an inmate's life is in danger. This recognizes the duty of the correctional system to protect an inmate, but raises the difficult issue of whether it is appropriate to use these provisions to segregate someone against his or her will for reasons believed to be in his or her best interests. We are of the view, however, that administrative segregation as set out here, which is limited to situations where no other alternative exists and only as a temporary measure, would be appropriate for an inmate whose life is in immediate danger. The inmate would be protected while long-term alternatives, such as protective custody, are developed with the inmate's input.

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[24] *Ibid.*, p. 12.

[25] *Ibid.*

[26] *Ibid.*, p. 16.

Criteria for placement in administrative segregation should be clearly set out, in order to aid the institutional head the Review Board in making their decisions, to ensure the inmate is not segregated arbitrarily, and to allow inmate to formulate a case for release into the general population. The inmate must be given reasons for the placement and a chance to present his or her case before the Segregation Review Committee. Although the criteria in the is the basic approach of are very broadly worded, this is the basic approach of CSC policy. In order to comply with the case-law, the proposals also provide that where the institutional head does not intend to follow a recommendation to release, the inmate should receive reasons for the institutional head's decision, and have an opportunity to respond to them before the institutional head.

In addition to supplying essential procedural protections, the proposals contain a ceiling on continuous time an inmate may spend in segregation. This represents a departure from present policy, under which no time limit is specified. The Working Group recognizes that segregation is a destructive experience which can only be justified as a temporary measure where no other alternative exists. Moreover, it is of the view that the severe emotional and psychological damage which may be inflicted by segregation is most often counterproductive in terms of the major correctional goal of reintegrating an inmate into the community. As noted in the *Report of the Study Group on Dissociation*:

> "Indeed, the ultimate goal of the criminal justice system is the re-integration of the offender into the community - adjustment to life outside the prison - and the basic fact of life is association. Similarly, the ultimate goal of a segregation unit ought to be to return the segregated inmate to association ... as soon as possible."[27]

The proposals recognize the importance of returning the inmate to the general population of the institution as soon possible by requiring the Segregation Review Board to develop a plan for the inmate's re-integration and to monitor plan during any subsequent reviews. In general, these proposals are intended to ensure that administrative segregation is used only in the event that all other measures have failed and not as a means of solving day to day problems of institutional management.

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[27] Vantour, J. (Chair). 975 *Report of the Study Group on Dissociation*, p. 29.

INMATE DISCIPLINE

Like any social organization, prison has at its disposal a host of rewards for acceptable behaviour - parole, temporary absence, earned remission - as well as penalties for non-compliance through the formal disciplinary process. These incentives and sanctions are designed to ensure, amongst other things, social control and conformity to institutional norms. While recognizing the importance of these goals we stress that a further goal of corrections must be taken into account. Corrections must not sacrifice measures that are designed to assist the inmate towards successful re-integration into the community. Therefore, in addition to clarifying and reinforcing the organization's values through punishment and deterrence, a disciplinary system should also be designed to influence inmates to adopt acceptable behaviour patterns to facilitate their eventual re-integration.

In response to recent case law and the coming into effect of the *Canadian Charter of Rights and Freedoms*, the prison disciplinary process has, of necessity, undergone dramatic change in recent years - from the informal "warden' s court" to one approaching a "quasi-judicial" process presided over by an Independent Chairperson.

The courts have intervened in prison disciplinary matters more than in any other area of institutional decision-making. This is mainly due to the fact that punishments imposed as a result of disciplinary convictions can affect the amount of time an inmate will spend imprisoned (through forfeiture of remission) and can significantly affect the conditions of confinement (through punitive dissociation). In addition, significant fines can be imposed as well as a range of less onerous penalties.

In order to comply with judicial decisions, particularly in relation to the duty to act fairly, clear rules governing the conduct of the hearing have been developed. Most recently, the Federal Court of Appeal, in *Howard v. The Presiding Officer of The Inmate Disciplinary Court of Stony Mountain*[28] (presently under appeal to the Supreme Court of Canada), has ruled that in at least some situations inmates charged with disciplinary offences should be entitled to counsel, due to the potentially serious impact on their liberty which a disciplinary conviction could entail. In the *Howard* case the Court commented specifically about the seriousness of loss of remission as a punishment, since such loss would effectively increase the period of time the inmate must spend in confinement. The federal government has subsequently taken the position that it is only where remission is at stake that counsel is necessary. A number of commentators, on the other hand, have argued that this narrow interpretation inappropriately limits the effect of *Howard*. What is important, they say, is the liberty of the inmate, and the Supreme Court of Canada, in the recent cases of *Cardinal & Oswald*, *Miller* and *Morin*,[29] has affirmed that inmates have a significant liberty interest in remaining in the general population, and that this interest is adversely affected by dissociation.

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[28] *Howard v. The Presiding Officer of The Inmate Disciplinary Court of Stony Mountain Institution* (1985), 19 C.C.C. (3d) 195 (F.C.A.).

[29] *Supra*, note 13.

The proposed disciplinary code, set out below for discussion, is quite similar to the existing provisions, although changes have been made where appropriate to reflect the need for greater clarity and certainty in the law. The reasons for these changes are discussed in the commentary. As well, the proposals recognize the need for the disciplinary process, as all correctional processes, to further the ultimate goals of corrections.

PROPOSED DISCIPLINARY CODE

Objective

1 **To foster an environment in which inmates conduct themselves according to acceptable and approved standards of behaviour thereby promoting good order in the institution and contributing to their successful re-integration into the community, through a fair and reasonable disciplinary process.**

Offences

2 **Every inmate commits an offence who:**

a) **wilfully disobeys a lawful order;**

b) **wilfully breaches a regulation or written rule governing the conduct of inmates;**

c) **commits or threatens to commit an assault against another person;**

d) **behaves towards any other person, by his or her actions, language or writing, in a threatening or extremely abusive manner;**

e) **takes or converts to his or her own use or that of another any property or article without the consent of the rightful owner or other person in lawful possession of the property;**

f) **wilfully or negligently damages any property of Her Majesty or of any other person;**

g) **has contraband in his or her possession;**

h) **deals in contraband with any other person;**

i) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant within the institution or when prohibited as a condition of any release from custody;

j) participates in, creates or incites a disturbance likely to endanger the security of the institution;

k) does any act with intent to escape or to assist another inmate to escape;

l) leaves his or her cell, place of work or other appointed place without proper authority;

m) gives or offers a bribe or reward to any person;

n) is in an area prohibited to inmates;

o) wilfully wastes food; or

p) attempts to do anything mentioned in paragraphs a) to o).

Definitions

3 "Contraband" consists of any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head to have the item in his or her possession.

"Intoxicant" consists of any substance, not on the approved list distributed to each inmate that, if consumed, absorbed, swallowed, smoked, inhaled, injected or otherwise used, would result in intoxication.

Manner of Proceeding

4 Where a staff member has reasonable and probable grounds to believe an inmate has committed or is committing a disciplinary offence, the staff member shall, where circumstances allow:

a) stop the commission of the offence and explain to the inmate the nature of the breach; and

b) where a person aggrieved by the alleged breach consents, allow the inmate to correct the breach where possible and make amends to the person aggrieved.

5 Where a staff member has reasonable and probable grounds to believe an offence has been or is being committed and where it cannot be resolved informally as in section 4, the institutional head or the staff member designated by the institutional head shall determine whether, depending on the circumstances surrounding the offence, to charge the inmate with a minor or serious violation, or to inform the police force having jurisdiction.

Procedures

6 An inmate charged with a disciplinary offence shall:

a) receive in writing notice of the date, time and place of his or her disciplinary hearing, and the specific charge and whether it is designated as minor or serious, not less than twenty-four hours in advance of the hearing;

b) have the charge described in sufficient detail to permit the inmate to know exactly what behaviour has lead to the charge;

c) be entitled to a hearing within seven working days of written notice of the offence;

d) have access to an interpreter, if necessary;

e) have the opportunity to be present and to be heard;

f) be entitled to assistance from another person or persons of the inmate's choice where the offence is designated as serious, provided the person has been approved for entry into the institution;

g) have the opportunity to question witnesses and call witnesses on his or her own behalf; and

h) have the opportunity to make submissions with respect to punishment in the event of a conviction.

7 An inmate charged with a minor offence shall appear before the institutional head or his or her delegate; and an inmate charged with a serious offence shall appear before an independent chairperson.

8 All proceedings related to the hearing of serious offences shall be recorded; those related to a minor offence shall be summarized.

9 The standard of proof required for conviction for any disciplinary offence shall be proof beyond a reasonable doubt.

10 A disciplinary conviction or acquittal is determinative of issues of fact relevant to subsequent institutional decisions.

Penalties

11.a) An inmate found guilty of a serious offence is subject to one or more of the following:

- **i) a warning or reprimand;**
- **ii) the loss of privileges;**
- **iii) a fine of not more than $50.00;**
- **iv) reimbursement of up to $500.00 for the amount of damages caused wilfully or negligently;**
- **v) a work order for a specified number of hours, not to exceed 100;**
- **vi) dissociation from other inmates for a period not exceeding (seven) consecutive days.**

b) An inmate found guilty of a minor offence is subject to one of the following:

- **i) a warning or reprimand;**
- **ii) the loss of privileges;**
- **iii) reimbursement up to a maximum of $50 for the amount of damages caused wilfully or negligently.**

c) The presiding officer of the disciplinary court may, in the case of a serious offence, suspend the carrying out of the sentence on the condition that the inmate is not found guilty of another serious offence during a specified period not exceeding ninety days from the date of the order. Where this condition is not complied with, the suspended punishment shall be carried out.

Independent Chairpersons

12.a) The Minister shall appoint an independent chairperson, other than an official of the Service, to preside over the hearing and adjudicate charges of offences designated serious.

b) The independent chairperson shall have relevant experience in the practice of criminal law, or experience with adjudicative bodies.

13. The Minister shall appoint a person other than an official of the Service to serve as Chief Independent Chairperson for each region of the Correctional Service of Canada whose duties shall include:

a) hearing appeals on matters of process and substance, for both convictions and sentence; and

b) monitoring and promoting consistency in dispositions.

COMMENTARY

The proposed objective for our disciplinary code specifies that the disciplinary process must not only promote an orderly and secure institution, but also contribute to the future re-integration of inmates. This implies that all disciplinary measures must be evaluated not only in terms of their immediate impact on institutional security, but also their long-term effect on the behaviour of the offender.

(I) OFFENCES

Section 2 proposes for consideration a revised list of disciplinary offences. In determining what conduct should be proscribed in a prison disciplinary code, it is important to remember that inmates, as all citizens, are bound by our criminal law, and violations of the law may be, and often are, prosecuted in the normal way in the courts. Nonetheless, we recognize that relatively minor violations of the criminal law, for example, vandalism, minor assaults or threats, or minor drug offences, might be more appropriately dealt with in an expeditious manner in an internal disciplinary process.

In addition, we recognize that certain kinds of behaviour, which do not constitute a criminal offence, may present a significant problem in an institutional context which warrants control through the disciplinary process. For example, it is important to the smooth running of a correctional institution that inmates comply with the orders of correctional staff and that inmates obey written rules governing their conduct. Possession of certain objects such as knives is a further example of conduct which may not be criminal, but which is generally thought to be inappropriate in an institutional setting.

The current offences have come in for considerable criticism by both the courts and others, on grounds that they are vague, over-broad, and may penalize behaviour which is not particularly serious.

The offence "does any act that is calculated to prejudice the discipline or good order of the institution" has perhaps come in for the most criticism on the basis that almost any act could potentially be included. This provision was traditionally used to deal with two kinds of behaviour not specifically covered in the *Regulations*: being intoxicated, and situations where an inmate slashes his or her body. The latter use for this disciplinary provision was criticized as inappropriate, and the *Regulations* have recently been amended to provide for a specific offence of consuming an intoxicant, although that amendment has also been struck down by the Courts. This issue will be dealt with below.

As we argued in the *Framework* paper, inmates should know with some certainty the rules which govern their behaviour. In a code it is desirable to articulate as clearly as possible the specific kind of behaviour which is prohibited. We therefore propose for consideration that the above offence be reworded as follows: "participates in, creates or incites disturbance likely to endanger the security of the institution". This formulation would restrict the ambit of the offence to actions which clearly have a connection to the of the institution.

Offences such as "disobeys or fails to obey a lawful order" and "contravenes any rule, regulation or direction made under the Act" have been criticized because the prohibited conduct can vary enormously from the most trivial to the most serious. Nonetheless these provisions are important to the of an orderly institution. Staff have to be able to expect compliance with their orders, and even where an inmate disagrees with an order (if, for example, he feels it is unreasonable), he should nonetheless comply with it. However, it is also essential that he be able to complain about the appropriateness of the order at a later point in time, either through the grievance procedure or the courts.

Nonetheless, the charge "disobeys or fails to obey a lawful order" by itself is so vague that an inmate may find it difficult to prepare a defence against the charge. It should be mandatory to include on the notice of offence, sufficient detail of the lawful order in question to permit the inmate to know the specific charge against him or her as required in section 6(b) of our proposals.

A number of the current provisions provide that an offence committed not only when the inmate *wilfully* commits an act but also when he or she *fails* to comply with the institutional rule or lawful order, or when the inmate negligently damages government property or the property of another person. In our view the disciplinary process should be reserved for intentional violations of institutional rules. Failure to hear an order, for example, should be grounds for acquittal rather than merely a reduced penalty. We would suggest, however, that the standard of negligence is acceptable in relation to cases of property damage, as this would allow cases of negligently damaged property to be dealt with within the institution rather than relying on outside courts.

The disciplinary regime controls a much more extensive range of behaviour than does the criminal law. It is our view, however, that behaviour should only be prohibited under the disciplinary regime where it constitutes a threat to the security or good order of the institution and where it cannot be controlled by any other means. Using these criteria, a number of the current offences should be either restricted or omitted entirely.

The offence, "refuses to work or fails to work to the best of his ability" can be criticized on a number of grounds. First, failure to work to the best of one's ability requires a subjective judgement that is more appropriately made in the context of decisions about promotions, demotions and work assignments. Although a refusal to work can be objectively documented, it does not constitute a threat to institutional security. In addition, the institution has a number of means at its disposal to penalize inmates who refuse to work. In addition to the foregoing examples of demotions or job loss, it would also be appropriate to withhold pay for days not worked, as well as to withhold all or part of the inmate's remission for the month.

Although these sanctions appear to be adequate, it should be asked whether they would be sufficient in cases where there is an institution-wide work stoppage. In our view there is still no need for a specific offence provision. If the behaviour is sufficiently aggressive to constitute participating in, creating or inciting a disturbance, then that offence can be charged.

The current provision "behaves toward any other person, by his actions, language or writing, in an indecent, disrespectful, threatening or defamatory manner" is framed in extremely broad language. Generally speaking, there appears to be a fair amount of tolerance in the penitentiary setting for language which might loosely be termed "crude", much of which would contravene this provision if enforced rigourously. A broad provision of this nature tends to be enforced selectively, when inmates step over the "line" - a line which is inevitably drawn in different places by different staff members. In our view, therefore, language should not constitute an offence unless it is threatening or extremely abusive towards another person. We therefore propose the following: "behaves towards any other person, by his or her actions, language or writing, in a threatening or extremely abusive manner".

The offence provisions regarding possession of contraband and use of intoxicants within the institution are designed to be as precise as possible, in line with the requirement that penal provisions be defined with enough precision so that those to whom they are addressed will have advance notice of what conduct is prohibited and those who are required to adjudicate on violations of the rule will have clear standards upon which to base their adjudication in order to arbitrariness.

The current offence provisions in regard to possession of contraband and use of intoxicants have been criticized on several counts. The *Parliamentary Sub-committee Report* has pointed out the problems with vagueness inherent in prohibiting "contraband" without specifying in any way those items which constitute contraband. It is difficult to develop a complete or inclusive definition of contraband, and we have therefore proposed that each inmate should receive a list of approved items, substances, etc., upon reception in an institution. Inmates would have to obtain written permission to possess an item not on the list, if circumstances warrant.

Recently the Quebec Superior Court struck down the provision in s.39 of the *Regulations* prohibiting consumption or other use of intoxicants.[30] In this decision (now under appeal), the offence was struck down for being both too broad and too vague, and because it could lead to arbitrariness in enforcement. The judge was of the view that a total prohibition on use of intoxicants, both inside and outside the institution, makes it impossible for the subject to know within what limits he or she can exercise his or her right to liberty and security of the person. The judge concluded that a proportional prohibition that would make it an offence to consume more than a specified level of an intoxicant would permit the subject to know the limits on his or her consumption.

After careful consideration we have come to the conclusion that a total prohibition on the use of such substances within the institution, rather than being too vague, is in fact exact and precise (provided the prohibited items are also clearly established). In regard to the broadness of the provision, we are of the view that a total ban on use of intoxicants in the institution is not only justifiable, but in fact necessary. In the special world of prisons, such a prohibition is both a necessary crime control provision and a necessary management tool. Controlling the use of intoxicants in a prison is aimed at both maintaining order, and at eliminating the trade in controlled substances and the associated conflict and violence among inmates which it engenders. This reasoning applies as well in regard to a prohibition on the use of intoxicants as a condition of temporary release from custody.

Finally, we considered whether the offence of "wilfully wasting food" should continue to be a disciplinary offence. On its face, it appears to be a relatively trivial matter in comparison with the other prohibitions against assault, escape, etc. It is our view, however, that gratuitous, wilful wasting of large amounts of food can constitute a significant problem in institutions. Another way of controlling the problem would be to ration the food given to each inmate in a more controlled fashion. Overall, it seems more desirable to maintain an environment where inmates are permitted as great a degree of freedom and responsibility as possible in relation to everyday matters such as meals. It seems inappropriate to restrict the majority of inmates to deal with relatively isolated problems, and on that basis, therefore, we are of the view that the offence should be retained.

(II) PROCEDURE

Sections 4 to 10 of the proposals discuss the procedures to be followed once a staff member is of the view an inmate has committed a disciplinary offence.

We recognize that in fact most infractions of the rules will be dealt with informally, through cautions, or suggestions to inmates about how to deal with particular problems. Indeed, the system simply could not function if all staff-inmate interaction were conducted at the formal level of the disciplinary system.

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[30] *Dion v. Commissioner of CSC, Re Dion and The Queen* (1987), 30 C.C.C. (3d) 108 (Que. Sup. Ct.).

The Working Group is of the view that conflict resolution through informal means should be further encouraged before recourse is had to the formal disciplinary process. The regulations governing the disciplinary process in British Columbia specify that staff members have a duty to attempt to resolve problems informally before laying a disciplinary charge.[31] We have adopted this approach in section 4(a) of our proposals. This provision will be beneficial to the extent that it encourages staff and inmates to solve disputes/problems in an informal manner, through negotiation skills, rather than by resorting to the full blown disciplinary process. This model is designed to be similar to interpersonal dynamics in the outside community, and may assist inmates to develop better problem-solving skills. In addition, we suggest that voluntary compliance with institutional norms is more likely to come about through this more personal, non-coercive, approach in which the inmate may actively participate in the resolution of the conflict.

In particular, this approach is more likely to contribute to the maintenance of order in the prison community by resolving inmate conflicts. A punishment meted out by a disciplinary board does not usually resolve the conflict between two disputing inmates. Indeed, the fact of one inmate being punished may intensify the conflict. Informal methods of conflict resolution must be recognized as a legitimate and integral part of the prison's disciplinary scheme and not be perceived simply as a means of avoiding the traditional disciplinary process.

The success of informal methods in the prison is dependent upon an educative process - both staff and inmates must learn a new set of values. Training in problem solving and anger management skills should not be limited to staff members. Inmates can benefit in two ways: the more they understand about the informal process, the more likely they are to regard it as a legitimate strategy for problem solving. Secondly, a by-product of inmate training in this area is the development of life skills for inmates which may carry over into their life in the community.

In conclusion, we suggest that conflict resolution through informal methods may better satisfy the goals of the inmate disciplinary system. It can contribute to the maintenance of good order in the institution in that it is more likely to actually *resolve* disputes than the traditional dispositions. Furthermore, it "normalizes" the disciplinary process by introducing a degree of flexibility that allows it to more closely approximate the nature of interpersonal relations outside the prison and thereby serves as an aid to the inmate's re-integration into the community.

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[31] Section 29 of the British Columbia Correctional Centre Rules and Regulations provides:
Duty of officer to attempt to resolve breach by inmate of rules and regulations
29. Where an officer has reasonable and probable grounds to believe an inmate has committed or is committing a breach of the rules or regulations of the correctional centre, the officer shall,
(a) where circumstances allow, stop the breach and explain to the inmate the nature of the breach, and
(b) where the person aggrieved by the alleged breach consents, allow the inmate to correct the breach, where possible, and make amends to the person aggrieved.

The procedural protections in section 6 are, for the most part, identical to the current provisions. The significant difference is an inmate's entitlement in s.6(f) to an assistant at all hearings for serious offences. The interests that are at stake when an inmate is charged with a serious disciplinary offence under our proposed provisions have led us to include this provision.

Recent judicial decisions have recognized that the principles of fundamental justice include a right to be represented by counsel in certain situations where an inmate's right to liberty or security of the person may be affected. In *Howard*, the Federal Court of Appeal dealt with the issue of whether the appellant had a right to counsel at a disciplinary hearing and more particularly whether section 7 of the *Charter* guaranteed him that right. The appellant had 267 days earned remission standing to his credit and it was subject to forfeiture as a result of the proceedings. According to Chief Justice Thurlow:

> It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible .... it appears to me that whether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. And from this it seems to me, it follows that whether or not an inmate's request for representation *by* counsel can lawfully be refused is not properly referred to as a matter of discretion but as a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation *by* counsel.[32]

The current *Parole Regulations* contain a provision which entitles an inmate to be assisted by a person of the inmate's choice when appearing before the Parole Board.[33] This provision is broad enough to allow an inmate to be represented by counsel, or if he or she prefers, to be represented or assisted by a law student or another person who has been approved for entry into the institution. We recommend the same for serious offences. Where the charge is for a minor offence and the proceedings are in front of the institutional head, there would be no 'right' to assistance, although it would be within the adjudicator's discretion to provide it where appropriate.

What are the implications of the presence of legal counsel at disciplinary hearings?[34] Concern has been expressed that it would impose an additional burden on the prison administration such that the process will become both more cumbersome and more costly. Nonetheless counsel have been present at disciplinary hearings to a greater or lesser extent across the country, with far less disruptive effect than was first feared.

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[32] *Howard, supra*, note 28.

[33] *Parole Regulations*, s.20.1.

[34] All aspects of this question are explored in Michael Jackson, "The Right to Counsel in Prison Disciplinary Hearings", (1986) 20 *U.B.C. Law* Rev. 221.

Indeed, in many cases counsel may actually expedite matters, since they will advise their clients that there is little point in trying to fight charges which are clearly well founded. We are thus of the view that this type of concern is not substantiated.

A further change to the current provisions is the elimination of the intermediate offence category. This category of offence was created in response to *Howard* to provide for offences where remission is not at stake. However, elsewhere in the present provisions, it is suggested that loss of remission is not an appropriate penalty and that it should therefore be eliminated. In accordance with this, there would be no need for a separate category of intermediate offences. The elimination of this extra category also makes the disciplinary scheme more straightforward and understandable.

There is a need for a consistent standard of proof to be applied in all disciplinary matters. Section 9 specifies that the standard of proof for conviction for a disciplinary offence should be proof beyond a reasonable doubt. In considering the appropriate standard of proof, it is important to recognize that many of the disciplinary offences encompass the same elements or acts which constitute a criminal offence. It would thus be inappropriate to substitute a lower burden of proof than exists in the criminal courts, especially since the punishments imposed may be at least as severe as those imposed by the courts.

In addition, case law appears to indicate (despite some conflicting decisions) that s.11 of the *Charter* applies to disciplinary offences,[35] and therefore a lower standard of proof, such as perhaps "preponderance of evidence", may offend section 11(d), which holds that:

> 11 Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ....

Present CSC policy requires that the evidence presented at a disciplinary hearing substantiate beyond a reasonable doubt each act of misconduct contained in the offence report.

Section 10 is a new provision which specifies that the findings of a disciplinary court as to matters of fact are binding on institutional officials in subsequent institutional decisions. This protects inmates in the case of acquittals, and should assist the institution where there has been a conviction.

(III) PENALTIES

The punishments currently available to the disciplinary court range from a "warning or reprimand" at one extreme to a period of dissociation or forfeiture of remission at the other. The latter two - dissociation and forfeiture of remission - are considered to be the most serious, are frequently imposed, and thus warrant special consideration here.

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[35] Re *Russell and Radley*, (1984) 11 C.C.C. (3d) 289 (F.C.T.D.) held that a disciplinary offence committed by a penitentiary inmate is an offence within the meaning of the *Charter*.

Punitive dissociation has been the subject of considerable discussion in the correctional literature. The conditions of confinement and the procedures have been extensively examined and, although the courts have held that they do not constitute "cruel and unusual" punishment, punitive dissociation is still regarded as the most severe disciplinary measure at the disposal of prison officials.

Is punitive dissociation a deterrent? The spate of literature, particularly in the early seventies, on the effects of isolation in this regard has not produced definitive results. We can say that the isolation of the inmate for a specified period of time clearly has an incapacitating effect for the duration of his or her confinement in punitive dissociation. Beyond that, there is little evidence that this strategy will deter the inmate from future rule-breaking following the expiration of his or her isolation. The 1975 federal Study Group on Dissociation was of the opinion that the effects "appear to be negligible in terms of deterring unacceptable behaviour"; that it "simply fulfills the need for a 'cooling out' period".[36] In addition, punitive dissociation may have extremely harmful effects on individual inmates.

For these reasons, the Working Group wishes to raise the question of whether punitive dissociation should be discontinued completely, or whether it should remain available but for a more limited length of time than at present. We have tentatively suggested seven days as a more acceptable length of time, and invite comments as to the effect this may have on inmates and the system.

Forfeiture of remission as a disciplinary measure is a curious case. It is clearly a very serious disciplinary measure, as it results in more time spent incarcerated. However, not all inmates can be punished through this mechanism. Remission has no meaning in the sentence of an inmate serving an indefinite term. A "lifer" cannot benefit directly from the accumulation of remission and cannot be penalized by a forfeiture of remission. In addition, any inmate who is paroled will avoid the impact of what amounts to a "paper punishment".

It is also important to recognize that an inmate serving a very long sentence may feel the impact of remission loss less than an inmate serving a short sentence whose remission loss have remission to his or her credit in order to lose it. Therefore, an inmate with little remission accumulated cannot be subjected to the same remission loss as an inmate who has accumulated considerable remission.

Is there a "payoff"? That is, does forfeiture of remission deter the inmate from further unacceptable behaviour? Does such a punishment deter other inmates? Forfeiture of remission is viewed as a severe punishment in that it constitutes a deprivation of liberty at the end of the sentence. In addition, a disposition of loss of remission can impact indirectly on other discretionary decisions made about the inmate.

Nevertheless, as a primary punishment its usefulness is questionable. We pointed out in our *Correctional Philosophy* paper that deterrence is most effective when coupled with speed and certainty of punishment. In the case of forfeiture of remission, the punishment is neither swift nor certain. The inmate who forfeits remission may lose "liberty" - if he or she is not granted parole. And even where he or she is not granted parole, the punishment - the loss of liberty may follow the commission of the act by several months or even years. As a general deterrent, it would appear to have limited capacity in view of the fact that it is not a highly visible act. Finally, there is no reason to believe that detaining an inmate for a few days longer will have any positive effect on his or her behaviour while on the street. Other dispositions currently available to the disciplinary court, such as fines and restitution, are more direct and constructive responses to disciplinary offences.

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[36] *Report of the Study Group on Disociation, supra,* note 27, p. 80.

Our proposals have eliminated forfeiture of remission as a possible disciplinary penalty. However this will be an important issue for discussion during the consultations. Other aspects or functions of remission are discussed in the Working Paper on *Conditional Release* where we note that remission is not necessary to achieve a period of supervised release in the community at the end of a sentence, since this can readily be done through a system of presumptive release. It is also the view of the Working Group that earned remission has not been effectively implemented as a system of positive incentives towards better program participation and behaviour. The issue of whether remission should be retained at all in Canada will have to be addressed in light of all relevant factors.

The Working Group does, however, propose the addition of a new penalty, that of a work order. This is modeled on the notion of a community service order, and would provide an opportunity for an inmate to perform some useful work, in addition to his regular work or educational responsibilities, as punishment for an offence. Ideally, such an order would be related in some fashion to the offence committed, but could also involve the utilization by the offender of some special skill he or she may have, for example, tutoring in the school, assisting in one of the shops, or assisting in a designed to benefit either the institution or the community. We are of the view that far greater attention should be paid to the constructive use of time by offenders, rather than placing them in isolation or keeping in custody longer.

We have maintained the existing penalties for serious offences of $500 reimbursement and $50 fine. However we are of the view that the current arrangement which permits an order for reimbursement of up to $500 for conviction for a minor offence is inappropriate, and we recommend that this be reduced to a maximum of $50. This could be imposed in addition to a loss of privileges. We also propose a new provision permitting reimbursement to persons other than Her Majesty, for example, where another inmate's property is damaged.

In light of our proposed restrictions on the use of punitive dissociation and forfeiture of remission, it may be that the levels of monetary penalties should be raised. This could also be done in conjunction with a provision extending the period for which a punishment can be suspended from 90 days to 6 months. We therefore invite comments on the nature and appropriate limits of disciplinary sanctions.

(IV) INDEPENDENT CHAIRPERSONS

Section 12 provides for the appointment of an independent chairperson to preside over hearings of offences characterized as serious. A major change is found in section 12(b), which provides that such chairpersons must have relevant experience in the practice of criminal law or a related area. Studies of the discipline process have indicated that experience with the adjudicative process is essential to the carrying out of the ICP function.

Concerns have been expressed about the degree of disparity in decision-making among ICP's. At present, the inmate may seek redress through the inmate grievance procedure with respect to claims that the established procedures were not followed by institutional staff or the institutional head where he or she is the presiding officer. However this will not usually affect the sentence imposed by the ICP. An inmate may also apply to the Federal Court for judicial review of the decision on procedural grounds, although recent case law suggests that the wording of the *Charter* may also refer to or embrace substantive standards.

There are a number of ways in which disparity in sentencing and the absence of inmate recourse could be addressed. For example, the use of "sentencing guidelines" for ICPs (and institutional heads, where appropriate) may reduce disparities. The appointment of a "Chief Independent Chairperson" whose responsibility would be to hear appeals on matters of process and substance, and to promote consistency in dispositions, could further enhance standardization, and could operate in conjunction with guidelines. Section 13 provides for a chief ICP in each region. In our view this is preferable to one chief ICP located in Ottawa because of the importance of regular contact with both local ICP's and the hearing process.

At the same time, it is necessary to canvas any alternatives that may exist, short of adding an extra administrative layer, to eliminate unwarranted disparity. One possibility would be improved information systems which would promote more informed and effective decision-making.

SEARCH OF INMATES

This section deals with search of inmates and their cells. Its main concern is the tension between the legitimate security concerns of penitentiaries which may require extensive search of inmates, and an inmate's right to be secure against unreasonable search or seizure protected in s.7 and s.8 of the *Charter*.

Few areas are more difficult to balance. On the one hand, the significant nature of individual rights affected by search and seizure, particularly rights to security of the person and privacy, call for search procedures to be carried out according to the "least restrictive" means available. On the other hand, the institution clearly has a legitimate interest in preventing the possession of contraband; weapons, drugs and other items that may pose a real threat to the security of the institution in the most direct way by affecting human life and safety. The Working Group presents the following proposals for consideration as to whether the proper balance has been struck.

The types of searches dealt with in this section are (1) general inspections of the living facilities of inmates; (2) sporadic and unscheduled "shakedowns" of cells and/or inmates; (3) frisk, strip, and body cavity searches of inmates; (4) searches of inmates which involve extraction of bodily substances such as urine and blood, and (5) searches by X-ray, ultra-sound or other technological means. The searches are those which apply to inmates "in custody", that is, within the institution, as well as inmates on escorted temporary absences in hospitals, etc.

A) PROPOSAL REGARDING SEARCH OF INMATES

Objective

1 **To authorize and regulate search procedures necessary to maintain a safe, secure environment while ensuring respect for the inmate's privacy and other rights.**

Definitions

2 **The following definitions shall apply to all searches of inmates:**

"Contraband": any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head or his or her designate to have the item in his or her possession.

"Administrative search" or "inspection": the power to conduct a routine search of a person, place or vehicle without individualized suspicion, and to seize contraband or evidence of an offence, to ensure compliance with security requirements or health and safety standards of the institution.

"Investigative search": the power of search and seizure where there are reasonable grounds to believe or suspect that a person, place or vehicle is carrying or containing contraband or evidence of an offence.

Search of a Person

Personal search may include the following:

"Walk-through scanner": a procedure in which the person being searched is required to walk through a metal detector scanner or subjected to a similar non-intrusive search by technical means.

"Frisk search": a hand search of a clothed person from head to foot, and includes the method of searching by use of a hand-held scanning device. If necessary, a frisk search may be expanded to require the person being searched to open his or her mouth, raise, lower, or open outer garments of clothing to permit a visual inspection.

"Strip search": a procedure in which the person being searched is required to undress completely before a staff member, and as well the person may be required to open his or her mouth, display the soles of his or her feet, present open hands and arms, and bend over to allow a visual inspection. In addition, all clothing and things possessed in the clothing may be searched.

"Urinalysis": a procedure in which the person being searched is required to provide a urine sample by the normal excretory process to a qualified technician for scientific analysis by an approved instrument.

"Manual body cavity search": a procedure in addition to a strip search which includes the physical probing of the rectum or vagina.

Search of Inmates

3 a) All searches are to be conducted in circumstances respectful of the privacy and dignity of the inmate to be searched. A strip search shall only be conducted by a staff member of the same sex as the inmate, and shall take place in a private area out of the sight of others, except for a witness of the same sex. A manual body cavity search shall only be performed by a qualified medical practitioner upon written authorization of the institutional head.

b) Where a staff member seizes things he or she shall issue a receipt to the inmate. The staff member shall bring the things

seized to a senior official and file with him or her a full report including the time and place of the search and seizure, the names of the inmate and staff members conducting the search, the reason why the search was made, and a description of the things seized. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

c) A staff member who conducts an investigative strip search in which nothing is seized shall be required to file a post-search report with a senior official. The report shall include the time and place of the search, the names of persons involved, and the reason for the search. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

d) Copies of all reports shall be retained.

Administrative Routine Search

4 a) A staff member of either sex may conduct a routine walk-through scanner search or a frisk search of an inmate

i) immediately prior to the inmate's leaving or on his or her entry or return to the institution;

ii) immediately prior to the inmate's entering or on leaving the open visiting area of an institution;

iii) where the inmate is leaving a work or activity area; and

iv) where the inmate is on a temporary absence outside the institution.

b) A staff member may conduct a routine strip search of an inmate

i) on an inmate's return to an institution;

ii) immediately on leaving the open visiting area of an institution; and

iii) on an inmate's leaving work areas in a situation where the inmate has had access to items which may constitute contraband that is of a nature which may be secreted on the body.

c) if a staff member, in the course of a lawful administrative search, discovers contraband or evidence of an offence he or she may seize it.

Investigative Search

5 a) A staff member of either sex may conduct a frisk search of an inmate where he or she has a reasonable suspicion that the inmate is carrying contraband or evidence of an offence. A reasonable suspicion is a subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent staff member to suspect that a particular person is concealing contraband on his or her body.

b) Where a staff member has reasonable grounds to believe that an inmate has committed or is committing the offence of using an intoxicant and that a urine sample is necessary to provide evidence of the offence, he or she may demand that an inmate submit as soon as possible to a urinalysis, carried out by a qualified technician. A sample shall be provided to the inmate upon request.

c) Where a staff member believes on reasonable grounds that the inmate is carrying contraband or evidence of an offence and that a strip search is necessary to detect the presence of the contraband or evidence, and he or she so satisfies his or her superior, the staff member may conduct a strip search.

d) Where a staff member, in the course of a lawful investigative search, discovers contraband or evidence of an offence, he or she may seize it. However, if during a strip search the staff member discovers contraband secreted in an intimate body cavity, he or she must obtain authorization for a manual body cavity search. A manual body cavity search shall only be authorized where the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband within an intimate body cavity and that such a search is necessary to detect and seize the contraband.

Search of Cells and Other Areas

6 If a staff member in the course of a lawful cell search discovers contraband or evidence of an offence he or she may seize it.

Administrative Search

7 **Routine searches of cells and activity areas may be conducted without specific grounds on a periodic basis by staff members in accordance with a search plan providing for random, thorough searches. An inmate representative shall be present when search of a cell is conducted.**

Investigative Search

8 **A staff member who has a reasonable suspicion that contraband is located in an inmate's cell may, with written authorization from a supervisor, enter the cell and conduct a search of the cell and its contents.**

b) **Where the staff member in s.8(a) believes on reasonable grounds that the delay necessary to obtain written authorization would result in loss or destruction of the contraband he or she may enter the cell and search for contraband without prior written authorization.**

Emergency Search

9 a) **Where an uprising or similar emergency has occurred in the institution, necessitating a general lockup whereby all inmates are confined to their cells, and there are reasonable grounds to believe that weapons, contraband or evidence relating to the emergency are to be found, a general shakedown of inmates, cells and other areas may be conducted incident to the lock-up on written authorization of the institutional head.**

b) **In the case of a shakedown search the staff members performing the search shall file a post-search report with the institutional head. The report should include the names of all staff members conducting the search, a list of all persons, cells and areas searched, and a description of any things seized. The portions of the report that pertain to a particular inmate shall be available on request to the inmate.**

c) **Copies of all reports should be retained.**

B) COMMENTARY

This part examines the present rules governing search and the impact of the *Charter*. It goes on to discuss the development of the proposals for discussion, set out above.

(I) PRESENT LEGAL FRAMEWORK

Search and seizure powers of prison officials are not mentioned in the *Penitentiary Act*. The only provision relating to search and seizure is found in section 41 of the *Penitentiary Service Regulations*, established pursuant to subsection 29(l) of the *Penitentiary Act*.

Subsections 41(2), (3) and (4) provide:

> (2) Subject to subsection (3), any member may search
>
> a) any visitor, where there is reason to believe that the visitor has contraband in his possession, and if the visitor refuses to be searched he shall be refused admission to or escorted from the institution;
>
> b) any other member or members, where the institutional head has reason to believe that a member or members has or have contraband in his or their possession;
>
> c) any inmate or inmates, where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of an institution; and
>
> d) any vehicle on institution property where there is reason to believe that such a search is necessary in order to detect the presence of contraband or to maintain good order of the institution.
>
> (3) No female person shall be searched pursuant to subsection (2) except by a female person.
>
> (4) There shall be a sign posted at the entrance to an institution, in a conspicuous position, to give warning that all vehicles and persons on institution property are subject to search.

In addition to these *Regulations*, Commissioner's Directives outline procedures to be used by staff members conducting searches.[37]

(II) PRE-*CHARTER* LAW

Prior to the entrenchment in the *Charter* of the right of everyone "to be secure against unreasonable search or seizure", challenges to prison search practices were generally limited in scope to the argument that a directive or order sanctioning a certain practice was inconsistent with the *Penitentiary Act* or *Regulations* and that it should therefore be declared unlawful to the extent of such inconsistency.[38]

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[37] Commissioner's Directives which are relevant in regard to search include: Searches - CD 571; Contraband - CD 570; and Urinalysis - CD 572.

(III) IMPACT OF THE *CHARTER*

With the introduction of the *Charter*, additional avenues have been opened on which challenges to prison search procedures may be based: that the conduct complained of amounts to cruel and unusual treatment or punishment under s.12; that it infrinqes on security of the person protected by s.7; or, most directly, that it infringes s.8 of the *Charter* which guarantees to everyone the right to be secure against unreasonable search or seizure. The Supreme Court of Canada has stated that the purpose of constitutionalizing the right to be secure against unreasonable search or seizure is to protect individuals from unjustified state intrusion upon a reasonable expectation of privacy.[39] In effect, the Court has established a minimum privacy threshold to be protected by the *Charter*. According to the Supreme Court of Canada, section 8 protects "persons not places" and the *Charter* applies where there is a reasonable expectation of privacy, rather than being limited to the more narrow protection of property or privacy interests traditionally associated with a dwelling.

It is clear that while incarcerated a person does not have as great an expectation of privacy as he or she would have in a dwelling house or private office. Nonetheless an inmate retains an expectation of privacy based on what is reasonable in the circumstances. The test of what is reasonable in the circumstances is not necessarily limited by present penitentiary conditions, under which inmates retain little privacy. Such deprivations of privacy are arguably a "functional prerequisite to the institutionalizing operation, deriving from the social organization of prisons and not from the legal status of persons found in them."[40]

It may be argued for instance, that an inmate has an expectation of *privacy* in his or her cell which is greater than in other parts of the institution, and which may require more protection in regard to search.[41] Such protection could take the form of accountability mechanisms requiring that, except in an emergency situation, the inmate whose cell is being searched could be present during the search. This would go a long way to meet inmate complaints and concerns about what may be happening to their cell or property when they're not there. Such a provision could, however, present serious logistical problems for both management and inmates; it may, for instance, result in inmates spending more time in their cells when they would otherwise be participating in programs.

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[38] An application based on this ground was successful in *Gunn v. Yeomans et al* (1979), 48 C.C.C. (2d) 544 (F.C.T.D.), where the question addressed was not whether a directive to thoroughly "skin frisk" all inmates in certain circumstances was necessary but rather whether it lawfully permitted the action taken with respect to the applicant. It was held that the institutional head may not make an order which conflicts with a provision dealing with the same subject matter found in the *Penitentiary Act* or the *Penitentiary Service Regulations*. An injunction restraining the respondents from carrying out searches except in accordance with the *Regulations* was granted. As a consequence of the decision, subsection 41(2) of the *Penitentiary Service Regulations* was amended to its present form.

[39] *Hunter et al v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.).

[40] Ronald R. Price, "of Privacy and Prisons", in Gibson, D. (ed.), *Privacy in Canada*, (1984), p. 376.

[41] The scope of an inmate's right in this regard is unsettled at the present time. A ruling of the Federal Court which held that inmates do not have a right to privacy in their cells sufficient to prohibit double-bunking is on appeal: *Piché, Newfeld, Daher, Breland and Smyth v. The Solicitor General of Canada, The Commissioner of Corrections, and the Institutional Head of Stony Mountain Institution* (1984), 17 C.C.C. (3d) 1.

To meet this concern, it may be more appropriate for an inmate representative, such as a member of the Inmate Committee, to be present during cell searches. The Working Group seeks comments as to the advisability of such an approach proposed in s.7 of the foregoing provisions. In addressing all these questions, it should be remembered that today the right to privacy is recognized as fundamental in Canadian society, and protection of privacy is being accorded increased legal safeguards and protections. In line with this approach, every effort should be made to provide an inmate with as much privacy as possible.

A further reason for protecting an inmate's reasonable expectation of privacy relates to the statement of purpose and principles of corrections, which recognizes the importance of a safe and healthful environment in encouraging offenders to prepare for successful re-integration into the community. A reasonable expectation of privacy is an element of the kind of institutional environment which is conducive to this goal.

Moreover, social scientists studying the escalation of violence in prisons have suggested that dealing with this problem through increases in search and seizure may be counter-productive.[42] Increases in search may lead to increased violence by interfering with whatever amount of privacy an inmate may reasonably expect. Without legal protection, an inmate's rights in this regard may be thoroughly eroded and at the expense, rather than the benefit, of prison security:

> Depriving inmates of any residuum of privacy or possessary rights is in fact plainly contrary to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence towards themselves or others."[43]

The Supreme Court of Canada, in *Hunter v. Southam*, made a number of important observations on the nature of the right protected in section 8 of the *Charter* and on the reasonableness standard which it embodies. Some of the conclusions drawn from this influential decision may be summarized as follows:

1) "The Canadian *Charter* of Rights and Freedoms is a purposive document ... intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for government action."

2) The purpose of section 8 is "to protect individuals from unjustified state intrusions upon their privacy". Section 8 guarantees a

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[42] A summary of the literature on point is found in Schwartz, "Deprivation of Privacy as a Functional Prerequisite: The Case of Prison" (1972), 63 *J. Crim. L. and Criminology* 229.

[43] *Hudson v. Palmer* 52 L.W. 5052 (1984), 5061 (U.S.S.C.).

"reasonable" expectation of privacy. "There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass." Section 8 protects people, not places, in dwellings and other premises.

3) In determining the reasonableness or unreasonableness of the search or seizure, regard must be paid to the impact on the subject of the search and seizure and "not simply on its rationality in furthering some valid governmental objective".

4) As a general rule, a search warrant is required for a reasonable search and seizure. Where it is feasible to obtain prior authorization, "such authorization is a precondition for a valid search and seizure".

5) For such an authorization to be meaningful, the person granting authorization for the search must "be able to assess the evidence in an entirely neutral and impartial manner".

6) There must be an objective standard for granting an authorization for a search. The minimum standard for section 8 in relation to the investigation of offences is "reasonable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search."

7) The relevant standard for granting an authorization might well be a different one "where the state's interest is not simply law enforcement" for instance, where state security is involved, or arguably, where the state's interest relates to security concerns of correctional institutions.

The "protection" afforded an individual by the *Charter* corresponds to the requirement for procedural safeguards and restrictions upon government officials. For example, the requirement that officials obtain a search warrant or other form of authorization before conducting a search protects the rights of the subject of the search by ensuring that the need for the search is verified by an independent official.

The issue, then, is the degree to which the safeguards and protections afforded individuals outside prison must be applied within prison. This may be restated in terms of whether the protections provided by the *Charter* are limited either through the meaning of "unreasonable" in section 8 or through the limitation clause in section 1 of the *Charter*.

The first question is whether section 8 applies to search of inmates. An examination of the wording of section 8 shows that "everyone" has the right to be secure against unreasonable search or seizure. There is nothing to indicate that the plain meaning of “everyone” should in any way be construed as limiting the right in regard to any group or individual. “Everyone” has already been given a broad and liberal interpretation in another context. It has been held that “everyone” means all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search or seizure, and includes corporations.[44] In short, section 8 wording indicates that everyone, including an inmate, has the right to be secure against unreasonable search or seizure.

This is consistent with the fundamental principle that an inmate retains rights except for those necessarily limited by incarceration. The fact of being imprisoned cannot alone be enough to alter the individual’s right to privacy, dignity, and personal security. The question then becomes whether a particular search or seizure, or search or seizure provision, intrudes on an inmate’s reasonable expectation of privacy.

It is obvious that the state would have a great deal of difficulty in operating a secure prison system if all search and seizure protections of open society, such as a requirement for a search warrant, were to be imposed before every search of an inmate. There is a strong need for the state’s conduct in the prison context to be regulated under a different, more flexible standard.

In the United States, the concept of flexible application of Fourth Amendment search and seizure protections originated with the US Supreme Court in routine government inspection cases, in weapons frisk cases, and in border search cases. In these cases, however, the courts, while recognizing traditional state interests, have been highly sensitive to the varying degrees of intrusiveness involved.[45] Of particular relevance is the American jurisprudence surrounding border searches.[46] Under the Fourth Amendment, border searches can be conducted on less than reasonable grounds. The standard shifts with the intrusiveness of the search. The courts have recognized a sliding scale of reasonableness which matches the intrusiveness of the search with the degree of prior suspicion or reasonable grounds necessary to satisfy the Fourth Amendment. In the border context, a customs inspector may search baggage or outer garments with "little or no threshold suspicion". Strip searches and visual body cavity inspections, however, require a showing of antecedent 'real suspicion'. Finally, manual body cavity probes can be performed only where there is a "clear indication" that contraband is secreted in the area searched.

In Canada, as well, border searches for contraband have been recognized by the courts as falling into a very special category. If a person reasonably arouses suspicion by giving the appearance of concealing something on his or her person, then he or she must expect to be asked to remove sufficient clothing to confirm or dispel the suspicion.[47]

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[44] *Southam Inc. v. Director of Investigation and Research et al.* (1982) 136 D.L.R. (3d) 133 (Alta.Q.B.).

[45] Discussed in David C. James, "Constitutional Limitations on Body Searches in Prisons" (1982) 82 *Volum. l Rev.* 1033 at p. 1050.

[46] See Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (St. Paul, Minn.: West Publishing Co., 1978), in particular Volume 3, section 10.9: "Searches Directed at Prisoners". Also, "From Bags to Body Cavities: The Law of Border Search" (1974), 74 *Colum. L. Rev.* 53.

[47] *R. v. Simmons* (1984) 45 O.R. 609 (Ont.C.A.). Under the *Customs Act* a person may be searched upon reasonable suspicion of a customs inspector; the person to be searched may require the inspector to take him or her before a police magistrate or justice of the peace, or chief officer of the place.

The border search cases provide a useful precedent for constructing an analytical framework for prison searches. The sliding scale of reasonableness adopted in the border search cases shows that there exists a "middle ground" between, on the one hand, saddling the government with an unrealistically high standard of proof, such as individualized reasonable grounds to believe, and on the other, allowing officials unfettered discretion to conduct searches. A sliding scale of reasonableness that balances the interests of the state and the individual and that recognizes how these interests change in varying circumstances has been adopted in the proposed procedures for search of inmates.

A major consideration in relying on a "sliding scale of reasonableness" is the precise type of search at issue. There is a basic distinction between "investigative" searches and "administrative" or routine searches or inspections.

Investigative searches are those which most closely resemble a criminal law enforcement search. They are based upon reasonable grounds to believe or suspect that an offence has been committed. An investigative search is one which would be performed, for example, where there is reason to believe a particular inmate is concealing contraband in a particular place.

Administrative searches, on the other hand, are based on on-going general institutional security needs and are performed on a routine basis. They are not based on grounds of suspicion or belief that an offence has been committed, nor are they directed at a particular inmate. An administrative search may consist, for example, of a personal search performed on a routine basis on every inmate entering or re-entering an institution in order to prevent the introduction of contraband. It is this type of search for which a more flexible standard may be necessary. It must at the same time be recognized that without some suspicion or other basis justifying the search, an administrative search without specific cause on a periodic basis may offend the standard in section 8 of the *Charter*. Provisions authorizing administrative searches must be clearly justifiable in relation to a legitimate correctional purpose in order to comply with section 1 of the *Charter*. Thus routine searches of inmates entering the penitentiary from outside appear reasonable, while mandatory searches of all inmates in a situation where they have had no access to the outside, to visitors or to contraband would likely be perceived as arbitrary and not justifiable.

Any departures from the constitutional protection generally given to search and seizure rights may be justified in relation to inmates either through the "reasonableness" standard of section 8 or the limitation clause of section 1 of the *Charter*. Section 8 of the *Charter* does not proscribe all searches, only unreasonable ones. Therefore, a challenged search which deviates from the traditional criminal law standard could still be found to be reasonable in the prison context.

There is more scope for balancing rights and interests affected through the section 1 limitation clause. As discussed in the Introduction, the Supreme Court of Canada has established a strict test to be met before *Charter* rights may be limited. A form of proportionality test is involved with 3 components: 1) the limiting measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it; 2) the means should impair the right in question as little as possible; and 3) there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

The sliding scale of reasonableness on which the proposals are based, which matches the intrusiveness of a search with the safeguards which must surround it, would appear to fit squarely within the Supreme Court of Canada's test. Where the limitations on the rights set out in the *Charter* meet the test articulated in section 1, the *Charter* has not been violated and the court's remedial powers thereunder are not called into play.

(IV) DEFICIENCIES OF THE PRESENT FRAMEWORK

As noted earlier, search and seizure powers of prison officials are not mentioned in the *Penitentiary Act*, but are dealt with in section 41 of the *Penitentiary Service Regulations*. This section sets out the standard for searches of inmates, visitors, staff members and vehicles on penitentiary property. Different standards apply to these groups. A visitor may be searched "where there is reason to believe that the visitor has contraband in his possession". A staff member may be searched "where the institutional head has reason to believe that a member or members has or have contraband in his or their possession". Inmates are subject to a much lower standard and may be searched "where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of the institution". It is important to note that the justification for this power is not limited to the control of contraband, but in addition, includes the much broader "interests of good order" test which considerably expands the basis of inmate search.

Despite this broad test, the Regulation is not comprehensive. It fails to make the necessary distinction between administrative and investigative search of inmates. Correctional authorities clearly have an interest in inspecting and searching inmates in order to control contraband. However, if an offence against the *Penitentiary Regulations* or other law is committed, it is also important that there be a residual power to enable staff members to search for and seize evidence of the offence. Such a power should be explicitly provided and the extremely vague "interests of good order" test replaced with specific grounds. Furthermore, the provision ought to specifically provide for the power to conduct routine administrative searches. In the provisions for discussion, the test for investigative search is specific and is based on the reasonableness standard of the *Charter*, and administrative searches are specifically allowed to be conducted on a routine basis.

The nature of the different standards in section 41(2) is significant. It is possible to view visitors and staff members as having a status in which "consent" may be realistically viewed as a factor. In other words, since both groups exercise some degree of choice in entering penitentiary premises, it is possible to argue that any departure from normal rules pertaining to search is a matter which these groups may agree to in order to gain access to the restricted area of the penitentiary. The Regulation, however, does not use consent as a basis for search; it adheres rather to the association of the members or visitors searched with contraband, and requires "reason to believe." The "reasonable to detect the presence of contraband" test for inmates, on the other hand, is extremely ambiguous, and arguably, deviates far from the reasonableness standard prescribed by the *Charter*.

The primary concern in relation to section 41(2)(c) is the extraordinarily broad discretion given to the individual staff member. The decision to perform any kind of search is totally within the discretion of the individual member. When this discretion is coupled with a weak and vague test (where a member "considers" rather than "believes on reasonable grounds"), it creates great potential for abuse. The problem is further exacerbated by the lack of post-search accountability mechanisms, such as reporting requirements. The proposals for consideration provide that receipts be given when things are seized, and that reports be filled out when more intrusive types of searches are conducted.

One further issue concerning the present *Regulations* arises from the provision in 41(3) that no female shall be searched except by another female. This provision appears to be clearly discriminatory on its face, as it precludes male searches of females, but not female searches of males. Without going into the various rationales both for and against such a position, it should be noted that there are presently cases before the court in which male inmates have challenged under the *Charter* the practice of cross-sex frisk searches and strip searches, even in cases of emergency, because of violation of their privacy. In these cases the courts must balance the privacy interests of the inmates (both male and female) against the equal opportunity interests of the female staff members. Depending on the outcome of these decisions, subsection 41(3) may be amended.

In addition to the *Penitentiary Service Regulations* there exist policy guidelines in the form of Commissioner's Directives and Divisional Instructions which outline procedures to be used by staff members conducting searches. Although these Directives result in limitations on inmate rights in regard to search, they are not generally considered to have the force of law. As discussed in the *Framework* paper, serious concerns are raised since any limitations on *Charter* rights must be "prescribed by law". These concerns would be met by setting out the procedures governing search of inmates in legislation or regulation. Searches performed in the course of administering and enforcing legislative schemes as diverse as the *Criminal Code* and the *Migratory Bird Convention Act* are provided for in the relevant legislation, and search of inmates in penitentiaries should not constitute an exception to this rule. The security element in penitentiaries does not provide a convincing reason for an exception as the *Criminal Code* and the *Official Secrets Act*, as well as other federal statutes, involve matters deemed critical to public safety and security, and yet contain detailed search provisions. Rules governing search and seizure should be rationally set out in the legislation itself, as in the case of all other federal search powers. This would represent the main change over the present situation, in addition to the more clearly articulated tests for different kinds of searches articulated above.

A further difference between current policy and these proposals is in relation to manual body cavity searches. While section 7(c) of CD571 requires the consent of the inmate before such a search can be performed, section 5(d) of the above proposals would permit a manual body cavity search without the inmate's consent where a number of safeguards are met, including requirements for prior authorization and that the search be conducted only by a qualified medical practitioner.

Even though it is recognized good practice to seek the cooperation of the subject of the search by asking them, for example, to voluntarily hand over the things to be seized, this issue raises for discussion questions about the validity of "consent" in the context of an inmate faced with the choice of consenting to a manual body cavity search or being placed in an "observation cell" for an indefinite period of time.

A further factor to be considered is whether it would be unrealistic to expect that medical practitioners will agree to conduct body cavity searches in the absence of a free and voluntary consent.

(V) OTHER TYPES OF SEARCHES

Also relevant to this discussion are searches of inmates which involve extraction and collection of internal bodily substances (such as urine and blood) and searches by technological means (such as X-ray and ultra-sound).

Searches which require extraction and collection of internal bodily substances fall generally within the class of investigative procedures which involves the gathering of evidence directly from the individual's person.[48] Such procedures have received special attention in Anglo-Canadian jurisprudence insofar as they are inextricably bound to general concepts off fairness and individual rights. Such procedures have traditionally only been allowed where there are reasonable grounds to believe a person has committed an offence, and subject to the strictest procedural safeguards. Even so, several issues arise in regard to the authorization, execution, and evidentiary use of such procedures. With the *Charter*, concerns have arisen that such tests could infringe the protection against self-incrimination (providing evidence against yourself) and security of the person, as well as potentially constituting unreasonable search or seizure, or cruel and unusual treatment or punishment.

Our proposals have been developed with a recognition of the intrusive nature of such procedures. We have refrained from recommending the use of blood sampling searches which require the puncturing of human skin, as we are of the view that they are unacceptably intrusive.[49] This approach is also consistent with CSC policy.

Changes to present CSC policy are raised for discussion in regard to urinalysis, however. CSC implemented a urinalysis program to detect the presence and deter the use of drugs and alcohol by inmates. Amendments to the *Penitentiary Service Regulations* (*PSR*s) in May 1985 provided authority for urinalysis. The test set out in the *Regulations*, however, was a very broad one: "where a member considered it necessary to detect the presence of an intoxicant in the body." We have suggested, because of the concerns set out above, that one approach would be that urinalysis should be authorized only where there are reasonable grounds to believe that the offence of being intoxicated has been or is being committed and urinalysis is necessary to obtain evidence to confirm it. This would restrict the authority for urinalysis in 9.41.1 of the *PSR*s, and is consistent with a judgement of the Québec Superior Court[50] (now under appeal) which declared the *Regulation* null and void.

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[48] Discussed in Law Reform Commission of Canada, *Investigative Tests* [Working Paper 341, (Ottawa: Supply and Services, 1984), p. 2.

[49] This reflects the present law; see *Laporte v. Laganière, J.S.P.* (1972), 18 C.R.N.S. 357 (Qué.Q.B.).

At the same time, we recognize that with the serious problem of drug use inside institutions the system must use all appropriate means at its disposal to reduce and eliminate it. The main question for consultation is thus whether mandatory or random drug testing would be more appropriate, considering the seriousness of the problem, than a more limited urinalysis provision based on reasonable grounds to believe.

When it comes to consideration of searches conducted by X-ray, ultra-sound and other technological means, we are of the view that, absent proof of ill effects on health, they should be used instead of body cavity searches whenever feasible, provided the inmate agrees. Although we have at this stage made no specific proposal, we urge the development and refinement of such methods.

One final word on search: although this paper is primarily concerned with search and seizure powers as they relate to inmates, it must be noted that efforts to increase the security of the institution through increases in both the number and level of intrusiveness of search of inmates may be both counter-productive and ill-conceived. As argued previously, increases in search of inmates may lead to further erosion of their privacy, which in turn may dehumanize and result in increased frustration and violence.

BASIC RIGHTS AND FREEDOMS

A) CONTACT WITH THE OUTSIDE WORLD

Losing meaningful access to the outside world has been and continues to be one of the most debilitating aspects of incarceration. These sections' proposals are designed to overcome, so far as may be possible, certain common aspects of incarceration which undermine and impede an inmate's chances of preserving meaningful contact with the outside world.

Outside prison, the freedom to visit with friends, talk on the telephone, or use the mails is not something that is provided for in legislation, nor is it specifically protected in the *Charter*. However these freedoms are matters falling within the ambit of the fundamental freedoms, such as freedom of expression, assembly and association, articulated in section 2 of the *Charter*,[51] and should be protected to the greatest extent possible. In addition, they supply a vital link between the inmate and the outside world; numerous studies have concluded that reintegration of offenders into the community is enhanced where there has been regular contact between the inmate and the outside world during incarceration.

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[50] *Dion v. Commissioner of CSC*, *supra*, note 30.

We therefore approach this area from the perspective that inmates retain the freedom to maintain contact with the outside world, through visits, correspondence and telephone. This freedom should be limited only where necessary to assure the security and good order of the institution, and the mechanisms chosen to limit the inmate's access to the outside world should be the least restrictive alternatives available.

Insofar as contact with the outside world reduces inmate frustration by providing an outlet, by increasing self-esteem and by enhancing the sense of belonging to the outside world, the goal of *immediate* institutional security may actually be enhanced by contact with the outside world. Nonetheless, it is also apparent that contact with the outside world may, in some instances, jeopardize the immediate security of the institution by, for example, introducing "outsiders" into the institution, thereby providing an avenue for the introduction of contraband. Accordingly, while clearly affirming an inmate's right to access to the outside world, we recognize that the security concerns of the institution must be identified and taken into account in the following proposals governing mail and visits.

(I) MAIL

The right to correspond, to receive publications such as books, newspapers, magazines and other mail, is protected by the *Charter*'s guarantee of freedom of expression. Therefore, it constitutes a retained right for inmates which may be restricted only in line with the *Oakes* standard. The *outside* communicator's expression is implicated in these substantive areas as well, and thus any restrictions must take into account the impact upon free persons' expression.

Correspondence is fundamental to the reintegration goal of corrections: most prisons are sufficiently remote that the mail constitutes the prime means of communication. Where inmates' families and friends reside beyond easy commuting distance to the institution, correspondence serves as the most important link between inmates and others outside the prison environment. Access to publications such as newspapers, magazines and books is also important as a means of keeping current with the political, economic and social concerns of the outside world, a world which the inmate, in almost every case, will one day re-enter.

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[51] Section 2 of the *Charter* provides:

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Arbitrary and broad restrictions upon correspondence, literature, and other mail, such as officials' reading of correspondence and censorship of correspondence and literature, raises serious legal and policy concerns. Although current policy proscribes the reading of mail in federal institutions without the prior approval of the institutional head, inmates cannot enforce this policy, and indeed, have no way of knowing whether it is being followed.

The potential which correspondence has for maintaining ties with the outside world can only be negatively affected by the knowledge that correspondence may be read or censored by institutional authorities. Moreover, short term institutional security may be jeopardized by the frustration and anger inmates experience when they feel that restrictions are arbitrary and overbroad. In 1976, the Ohio Advisory Committee to the United States Commission on Civil Rights reported that their hearings revealed that after the state of Ohio ended mail censorship and enhanced other contact-with-the-outside-world rights, such as visits and contact with the media, prisoner morale was bolstered. Moreover, one expert witness testified that in her opinion violence and brutality within the Ohio prisons had "ceased to be a large-scale problem". She attributed this improvement to the newly instituted prohibition on mail censorship.[52]

The right to confidential correspondence also provides a crucial avenue to obtain the ear of the general public, public officials, the media and the courts. Censorship and other "chilling" exercises, on the other hand, render prison a closed society, one which operates away from the scrutiny which public institutions deserve. As such, uncensored, confidential correspondence provides an enormously important conduit for public access to and knowledge of the prison system. Due to the importance of such contact, correspondence between legal counsel, the courts and public officials receives special attention in the proposals for possible inclusion in law which are set out below.

The major security concern which must be balanced against the above considerations is the potential for introducing contraband into the institution in envelopes and packages. The introduction of drugs and money is of particular concern, but the introduction of weapons concealed in packages is also a possibility. Secondary security concerns articulated by correctional authorities include the potential for escape plans and the planning of illegal activities as well as the potential of some reading and viewing material to increase prison violence. Given the importance of freedom of expression in a society such as ours, however, these concerns must be met in such wavs as infringe as little as possible upon inmates', and in some cases their outside correspondents', freedom of expression.

Complaints have been made with regard to institutional authorities reading inmates' correspondence.[53] It has been suggested that this may frequently be done without specific authorization from the institutional head and with no valid security concern in mind. The suggestion has also been made that even authorized reading of inmates' correspondence has very rarely exposed immediate threats to institutional security, conspiracies to promote illegal activity or escape plans. Moreover, the fact that institutions rarely censor correspondence by *deletion* suggests that they are finding little which would constitute a threat to the institution or the public. For our purposes it is important to note that in jurisdictions where routine reading and censoring of inmate mail has been abolished (in the US in Washington, Ohio and New York, for example) there has been no escalation in security violations.[54]

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[52] Ohio Advisory Committee of the U.S. Commission on Civil Rights, *Protecting Inmate Rights: Prison Reform or Prison Replacement?*, February 1976.

[53] Price, *supra*, note 40.

Given the importance of protecting inmates' freedom of expression and the fact that the major security concern is associated with the passage of contraband through the mail, the provisions have tailored the restrictions upon inmates' retained right of expression to deal specifically with that concern. Additionally, they suggest that content restrictions upon publications which are thought likely to increase or lead to prison violence may be called for. They also provide for certain restrictions as to who an inmate may correspond with.

Mail

1 **Inmates have the right to send and receive mail freely except as restricted herein and subject to any other legal restrictions on the use of the mails.**

Postal Observer

2 **The inmate committee may appoint an inmate, designated the postal observer, to observe the actions of the postal officer in receiving, opening, and distributing mail. The postal observer shall witness any opening of mail, and shall sign, as witness, a daily statement by the postal officer indicating all items of alleged contraband found in the mail, or that there was none, and that mail was not read or censored, if such is the case.**

Privileged Correspondence

3 **Correspondence to and from persons listed in Schedule A hereto is designated as privileged, and may not be opened or inspected by correctional authorities.**

Outgoing Correspondence

4 **Outgoing correspondence other than that covered by s.3 above may be sealed by the inmate and shall not be opened, but**

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[54] American Bar Association, "The Legal Status of Prisoners" (1977), 14 *American Criminal Law Review* 377, at p. 496.

a) such correspondence may be submitted to inspection that does not involve opening the mail, and where such inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to public safety or evidence of an offence, the institutional head may authorize the opening of the package or envelope for inspection, but not reading, of the contents.

b) A package or envelope may only be opened pursuant to paragraph a) above in the presence of the postal observer, and the inmate sending the mail must be advised in writing of the reasons that the mail was opened.

5 Inmates may correspond with whomever they wish, except that the institution may refuse to permit correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests that they receive no further correspondence from an inmate. The inmate must be notified in writing that the correspondence may not be sent, with reasons for the prohibition.

Incoming Correspondence

6 Incoming correspondence may be opened in the presence of the postal observer so that the contents of the envelope may be inspected for contraband, but the correspondence may not be read.

Publications

7 The institutional head may prohibit entry into the institution of any publication which

a) violates federal or provincial legislation governing publications;

b) portrays excessive violence and/or aggression and which is likely to incite inmates to violence; or

c) contains detailed information on the fabrication of weapons or the commission of criminal acts which would endanger the security of the institution or public safety; and

d) where publications are prohibited pursuant to paragraph a), b) or c) above, the inmate shall be given reasons in writing for the prohibition.

General

8 **Inmates who are unable to read or write are entitled to the assistance of a staff member, volunteer, or another inmate for correspondence purposes.**

9 **Indigent inmates shall receive postage, stationary and envelopes for at least five general correspondence letters per week and as many privileged correspondence letters as requested.**

Schedule A

1) **Solicitor General of Canada**
2) **Deputy Solicitor General of Canada**
3) **Commissioner of Corrections**
4) **Chairman of the National Parole Board**
5) **Correctional Investigator**
6) **Inspector General**
7) **Governor General of Canada**
8) **Canadian Human Rights Commission**
9) **Commissioner of Official Languages**
10) **Information and Privacy Commissioners**
11) **Members of the House of Commons**
12) **Members of the Senate**
13) **Members of the Legislative Council for the Yukon and the Northwest Territories**
14) **Members of the Provincial Legislatures**
15) **Provincial Ombudsmen**
16) **Consular Officials**
17) **Judges and Magistrates of Canadian courts (including their Registrars)**
18) **Legal counsel, legal aid services or other agencies providing legal services to inmates**

COMMENTARY

Section 1 articulates the basic right to send and receive mail freely, subject to permissible restrictions which are set out subsequently in the proposals for discussion and subject to restrictions which may exist in other legislation. These latter restrictions include laws concerning sedition, defamation, libel, hate literature, pornography and obscenity and the like: they may be utilized to control inmates' freedom of expression to the same extent that the expression of free persons may be controlled.

Section 2 proposes the most significant change to institutional operations related to mail: that an inmate observe and inspect any opening of inmate mail. Although the most desirable approach from the inmate's perspective would be for all mail to be inspected in the presence of the inmate who is sending or receiving it, the Working Group recognizes that this would place a significant burden on institutional authorities. On the other hand, it has long been recognized that inappropriate inspection and scrutiny of inmate mail is particularly difficult for inmates to challenge. For the most part they cannot know whether their mail is being read, and yet the belief that it may be has a significant "chilling" effect on their communications. An inmate observer who oversees the inspection of correspondence would improve inmate confidence that, in the absence of formal notification, his or her mail is not being routinely opened and read. This would be of benefit not only to inmates, but also to staff. Of course, the provision for a postal observer raises several concerns which must be discussed during the course of our consultations. It has been pointed out, for instance, that it may not, on occasion, be in an inmate's best interests to have it known by other inmates that contraband was seized from a particular inmate's mail or that a particular inmate received money to be deposited into his or her account. In fact, it may even constitute a threat to the inmate's personal security and affect his or her privacy rights and thus may contravene section 7 of the *Charter*.

The power to open and inspect mail is dealt with in sections 4 and 6. Because outgoing and incoming mail present different levels of concern, they are treated differently. Clearly, outgoing mail presents far less of a security threat to the institution than does incoming mail. Outgoing mail may, however, present some contraband concern. For example, money may be mailed in exchange for a future receipt of contraband. Thus section 4 permits the institution to inspect outgoing envelopes and packages without opening them. Where that inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to safety, or an object which could constitute evidence of an offence, the institutional head may authorize the opening of the mail to inspect the contents. Thus, the institution may deal with concern for both protection of the public and trafficking in drugs or other contraband without resort to a search warrant. At the same time, the inmates' and prospective recipients' freedom of expression rights are protected to the fullest extent possible, consistent with institutional security concerns, by ensuring that the mail is opened in the presence of the observer and the inmate sending the mail is notified in writing of the action taken. Incoming mail may be opened on a routine basis pursuant to section 6 of the proposals because it presents a greater security threat than does outgoing mail. Again, it is proposed that this be done in the presence of the inmate observer.

Unlike the proposals for discussion regarding the receipt of publications (s.7) which require some reading or other perusal of the publication in order to determine content, other mail may not be read. It seems clear that on a sliding scale of rights and interests, correspondence, both general and privileged, is entitled to more privacy-protection and protection against censorship than are publications. By their very nature, the latter are intended for public consumption. Correspondence, on the other hand, is not, and the chilling effect of potential reading or perusal is much greater. Insofar as the introduction of contraband is the major concern, physical inspection will meet this important security concern. We have also suggested that while illegal dealings, conspiracies and escape plans may occasionally pass through the mail, the threat is relatively remote and the importance of unchilled freedom of expression to successful re-integration so great, that to allow broad-based reading of mail would amount to using "an elephant gun to kill a mouse", which is precisely the sort of overreaction prohibited under the *Oakes* section one test. This is not to say, however, that authorities would not be able to deal with situations where there are reasonable grounds to believe that criminal activity is taking place or being planned through inmate mail: in such situations the normal criminal process would apply. The experience in American jurisdictions referred to earlier in this section suggests that this is the preferable approach.

Section 5 would allow the institution latitude to restrict correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests it. This provision is designed to deal with situations where victims of an offence receive unwelcome correspondence from an inmate. It is the view of the Working Group that the situation of victims mandates special protection. However the proposal as presently framed is also broad enough to encompass a situation where a family member who wishes to terminate contact with an inmate may request that the correctional authorities intervene to intercept mail. We would suggest that routine consent to this type of a request by a family member should be avoided, since it would place institutional authorities in an inappropriate role vis-à-vis the personal relationships of inmates. If threats are being made in letters, the recipients can, and should, report these to the police. If the letters are simply unwelcome, the recipients need not open them.

There remains the question of whether correspondence with other persons should ever be prohibited, for example, with ex-inmates, or with persons believed to be associated with organized crime. The Working Group suggests that this should not be done. As noted above, the criminal process may be utilized where there are reasonable grounds to believe criminal activity is being planned. We are of the view that a restriction based only on the correspondent's status as an ex-inmate is too great an infringement on freedom of expression.

Section 7 provides for restrictions on the entry of publications in addition to the *Criminal Code* and other limitations discussed above. Recognizing that penitentiaries may be more explosive environments than other institutions, subsections b) and c) empower the institutional head to prohibit the entry of publications which are likely, by virtue of their violent or aggressive content, to incite violence. It must be noted that in light of the decision in *Ontario Film and Video Society v. Ontario Board of Censors*,[55] objective standards and criteria by which to judge what constitutes excessive violence and/or aggression would have to be developed. According to the case, any limitations on freedom of expression cannot be left to administrative discretion and instead must be articulated with some precision in a provision that has the force of law.

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[55] *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, (1983) 147 D.L.R. (3d) 58 (Div. Ct.); affirmed, (1984) 5 D.L.R. (4th) 766 (Ont. C.A.); leave to appeal granted (S.C.C., April, 1984).

(II) VISITS

The opportunity to visit with friends, family members and other persons from the outside world may be the most effective way to maintain bonds necessary for successful re-integration. As the *Correctional Philosophy* paper stresses, activities such as visits should be viewed as fulfilling an important objective of the institution, not just as a humanitarian concession to inmates. By introducing outside persons into the institution, however, visiting may present a greater potential threat to the immediate security of the institution than correspondence and telephone conversations. Thus, in developing proposals in this area, the potential problems associated with visiting must be identified and balanced with the benefits. This is the approach of present CSC policy; these provisions go further in that they would be specified in law.

Visits

2 a) All inmates have the right to visit with whomever they choose, subject to reasonable time and place limitations and to the restrictions herein.

Refusal or Suspension of Right to Visit

2 a) The institutional head or designate may refuse or suspend a particular visit

  i) where there are reasonable grounds to believe that immediate and pressing security concerns demand it, and where restrictions on the manner in which the visit takes place would not be adequate to control the risk; or

  ii) where during a public visit, either the inmate or the visitor behaves in a manner that exceeds the bounds of acceptable behaviour in a public place.

b) Where the visit is suspended or refused, reasons for such shall be documented and the inmate and visitor informed of such reasons.

c) The institutional head may order a complete suspension of all rights to visit in an institution only where the security of the institution is at significant risk and where there is no less drastic alternative. Any such order must be reviewed by the Deputy Commissioner of the Region after 5 days and by the Commissioner of Corrections after 14 days.

Security and Monitoring of Visits

3 **The institutional head shall respect, protect and enhance the privacy of inmate visits to the greatest degree possible, however, he or she may authorize the visual supervision of the visiting area in an unobtrusive, nonmechanical manner, and, in the case of a section of a visiting area which is inaccessible, he or she may authorize mechanical visual monitoring.**

4 **The institutional head shall protect the privacy of inmate-counsel interviews by**

- **a) providing interviewing facilities which may be within sight but not within hearing of any person and**
- **b) providing interview facilities which have no glass or metal barrier between inmate and counsel, except where counsel requests a barrier for his or her safety.**

5 **Interviews between inmate and legal counsel shall not be monitored or recorded with listening or video devices.**

6 **Subject to s.3, there shall be no interception by means of an electro-magnetic, acoustic, mechanical or other device of an inmate's visit, unless prior authorization from the institutional head has been obtained, on the basis that there is evidence of a threat to the security of the institution.**

Open Visiting

7 **Visits shall take place with no physical barrier to personal contact except where**

- **a) it is necessary for the safety of the visitor, or**
- **b) the visit would present a serious threat to the security of the institution, and, where less drastic means (such as non-intrusive search) will not meet the security concern.**

8. **Where visiting is restricted pursuant to section 7 a) or b), the reasons shall be fully documented and the inmate and visitor informed of those reasons and provided with an opportunity to respond.**

COMMENTARY

These proposals recognize the importance of the right to privacy in the context of visiting while at the same time providing for the possibility of monitoring visits where legitimate security concerns warrant it. They follow *Maltby*[56], which held that nonmechanical visual surveillance of visits through glass is a reasonable limit on freedom of association and expression.

The importance of privacy to the well-being of inmates, and the importance of contacts with the outside world to the goal of re-integration, is documented in numerous studies on inmate visits.[57] However, the retained right of privacy, or at least "a reasonable expectation of privacy", and the importance of privacy in communications between inmates and others must be balanced against the security needs of the institution. The major security concern related to visits is the passage of contraband, particularly drugs and money.

Finally, while intrusive surveillance has been justified on the theory that it is instrumental in monitoring the pulse of the institution, it has also been suggested that close relationships between staff and inmates and awareness of and sensitivity to inmate-inmate interactions and patterns is much more telling. To the extent that personal, nonmechanical supervision of such relationships is less intrusive than mechanical surveillance of inmate-visitor interactions, and promotes better staff-inmate relationships, the former is to be preferred. This is recognized in present policy: CD 770, entitled Visiting, states that to the greatest extent possible, visits shall be provided in a friendly, relaxed environment. It stresses that dynamic security is of particular importance in visiting areas. It seems reasonable, however, that where there exists a section of a visiting area which is inaccessible from view, mechanical surveillance may take place where the institutional head authorizes it.

Security is not the only issue to be considered here: the impact of different types of surveillance on inmates and their visitors is also relevant. Views on the relative intrusiveness of personal monitoring of visits, as opposed to video or audio monitoring, will be solicited during our consultations. The proposal in section 3 recognizes inmates' retained right to privacy while allowing nonmechanical., visual supervision of the visiting area in response to legitimate institutional security concerns. Insofar as the major, enduring security concern is the passage of tangible items, viewing of the area coupled with legitimate nonintrusive searches which may be permitted pre- and post-visit, and the provision in section 6 for more intrusive surveillance in certain, unusual circumstances appear to be the most appropriate means of balancing the interests at stake.

Sections 4 and 5 of the recommendations essentially codify the common law in regard to solicitor-client privilege. Communications between solicitor and client are confidential and therefore require 'extraordinary precautions'. In *R. v. Faid*,[58] the Alberta Supreme Court held that the *Canadian Bill of Rights* required that the institution in question must provide facilities for inmate-solicitor interviews that are "within sight but not within hearing of any person" and that the interview facility must not, as a general rule, impose a barrier between inmate and counsel. This is also reflected in present CSC policy.

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[56] *Maltby v. Attorney General of Saskatchewan et al* (1983), 2 C.C.C. (3d) 153 (Sask.Q.B.)

[57] For example, see Stanley L. Brodsky, *Families and Friends of Men in Prison* (Lexington, Mass.: D.C. Heath & Co., 1975) and Chelene Koenig, *Life on the Outside: A Report on the Experiences of the Families of Offenders from the Perspective of the Wives of Offenders* (Chilliwack, B.C.: Chilliwack Community Services, 1985).

[58] *Faid v. The Queen* (1978), 44 C.C.C. (2d) 62 (Alta.S.C.), at p. 64.

Clandestine surveillance and monitoring of visits by means of tape recording and video cameras is highly intrusive. Section 6 of the proposals therefore attempts to provide for reasonable, yet restricted, monitoring powers by requiring prior authorization to ensure that electronic monitoring is not carried out routinely.

While visual surveillance by video taping might be slightly less intrusive than auditory surveillance, it is felt that the chilling effect fear of video surveillance would most likely have upon visiting with family and friends, where closeness and touching is to be expected, requires that its use should be reserved for specific situations of concern. The fact that many inmates do not have conjugal visits highlights the importance of limiting the use of video surveillance. Moreover, given the typical security concerns, unaided visual surveillance should be able to meet those security needs as a matter of course.

The importance of open or contact visits to both inmates and the security of the institution is highlighted in many different sources. In *Maltby*, where the inmates were not allowed contact visits, the Saskatchewan Court of Queen's Bench relied upon Karl Menninger's assessment of the importance of contact visits. The Court stated:

> The impact of deprivation of contact visits and their psychological importances are real. Dr. Karl Menninger, the psychiatrist of national renown, who has studied and written about prison conditions over a long lifetime, deplored non-contact visits as 'the most unpleasant and most disturbing detail in the whole prison' and described them as 'a violation of ordinary principles of humanity'.[59]

In keeping with the importance of maximizing the opportunity for contact visits on potential reintegration of the inmate, section 7 of the proposals seeks to enhance the availability of contact visits.

B) INMATE ORGANIZATION, ASSOCIATION AND ASSEMBLY

General Rights

1 **Inmates have the right to form and join organizations for any lawful purpose, to solicit membership without coercion, to associate, to assemble, to circulate petitions for signature and to peacefully distribute lawful materials subject to reasonable time, place and staff limitations and subject to the following restrictions.**

2 **All inmate organizations desiring to associate, to assemble, to use institutional facilities and to have access to available**

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[59] *Maltby*; *supra*, note 56, p. 167.

institutional resources and materials, must provide the institutional head with a membership list and a written description of the purpose of their organization.

3 **The institutional head may restrict organizations and assembly in the following ways:**

a) **Where an assembly is to take place, the institutional head may assign staff to observe the assembly, but he or she shall seek to accommodate the organization's request for the assignment of specific staff.**

b) **Where an assembly is to take place that would, in the opinion of the institutional head, pose a threat to the security of the institution or to the protection of the public, he or she may prohibit it.**

Inmate Committees

4 **Inmates in every institution are entitled to form inmate committees, which shall be governed by the above provisions, and which shall, to the greatest extent possible, be involved on a continuing basis in the decision-making processes of the institution as they concern the inmate population.**

5 **The institutional head may remove a member of the inmate committee only where:**

a) **that member's committee activities pose a substantial threat to the security of the institution or to the protection of the public; or**

b) **that member abuses his committee position to achieve ends which are patently inconsistent with institutional security.**

6 **Where an inmate committee member is removed, the institutional head shall inform the affected inmate of the reason for the decision, in writing, and the inmate-member shall have an opportunity to respond.**

COMMENTARY

Freedom of association is crucial for inmates, whose normal channels of communication with others are severely limited and whose incarceration dissociates them from society. In the following discussion of organizations, association and assembly we shall discuss several issues which are also relevant to the next section of the paper, on freedom of religion in penitentiaries. Freedom of religion is typically exercised in groups. Therefore, the associational aspects of religious observance are covered by the present provisions. We deal separately with inmate committees in the proposals for discussion above because, insofar as they constitute 'inmate government', they are amenable to additional considerations.

Inmate committees are provided for in present CSC policy. They are vehicles through which inmate representatives may express inmate concerns, needs and grievances. Fully functioning inmate committees, moreover, act in concert with the penitentiary administration, representing inmates' interests on a wide variety of institutional concerns. Inmate committees both encourage citizenship skills and permit and encourage responsible behaviour by permitting inmates to exercise their decision-making powers, to make choices, and to take positions for which they will be held responsible.

Institutional security is also enhanced by the presence of active inmate committees. Representation of inmate concerns and inmate input into institutional decisions solidifies the interests of inmates and institutional authorities. It also permits the systematic and structured communication of inmate concerns and problems to institutional authorities, thereby permitting the authorities to 'monitor the pulse' of the inmate population in a positive manner and to respond constructively and prospectively. Inmate committees can thus serve to stabilize the prison and assist administrators.

As well as supporting important correctional goals, inmate committees and other inmate organizations are protected by the *Charter*'s guarantees of freedom of association, freedom of peaceful assembly and freedom of expression. Therefore, as with the other rights and freedoms considered in this paper, these retained rights must be restricted as little as possible, consistent with institutional security and protection of the public.

C) RELIGION

Freedom of religion has long been recognized and protected in Canadian prisons and penitentiaries. The right of inmates to exercise freedom of conscience and religion is supported by the principle of retained rights and the goal of re-integration. Section 2 of the *Charter* protects the right to manifest religious beliefs through practices, as well as to hold religious beliefs. Judicial decisions indicate that both section 15 of the *Charter*, the equality section, and section 27, the section which mandates that the *Charter* must be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", suggest that freedom of religion must protect minority and newly-founded religions as well as established, majority religions. This raises an important issue in the corrections context: how far should the institution go to accommodate different religions?

The major institutional concerns regarding freedom of religion centre more upon the responsibility of the institution for providing for special religious rites and rules than upon security concerns. The issue of equality of treatment is also paramount. Religious observances and religious diets have been particularly problematic in this regard as they may impose considerable expense as well as an administrative burden upon the institution. Security concerns do arise, however, in the context of certain religious symbols, such as the wearing of daggers required by the Sikh religion.

Freedom of Religion

1 All inmates have the freedom of conscience and religion and are entitled to express their spirituality and exercise their religion freely, restricted only by immediate and pressing security concerns of the institution.

2 Without limiting the foregoing, this freedom includes

a) the freedom to express religious beliefs through religious practice which may include expression orally, in writing, in dress, behaviour and religious possessions, and

b) the freedom to congregate together, in accordance with the provisions on inmate assembly and association.

3 Correctional authorities shall make available the necessities required for inmates to manifest their religious beliefs equitably, and to the degree possible, including, but not so as to limit the foregoing:

a) interfaith chaplain;
b) facilities, such as chapel for religious worship;
c) worship service;
d) pastoral counselling;
e) special diets as required by the inmate's religious tenets; and
f) special religious rites on holidays generally observed by their religion.

COMMENTARY

The proposals for possible inclusion in law on freedom of religion do not deal with visits by outside clergy and other religious leaders, nor with religious mail and publications, as these are covered by the proposals governing visiting and mail.

Section 1 above articulates the right of inmates to express and manifest their religious beliefs, subject only to restrictions based upon pressing security concerns. The provision is consistent with the Supreme Court's definition of freedom of religion, which includes the right to 'teach and disseminate' and to 'declare religious beliefs openly and without fear of hindrance or reprisal.'[60]

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[60] *R. v. Big M Drug Mart*, *supra*, note 5.

The provisions place an onus on the institution to provide necessary aspects of inmates' religious beliefs and expression. Section 2 seeks to avoid placing an excessively onerous burden on the institution by stipulating that the provision of religious necessities need only be 'to the degree possible'. The requirement that such necessities be provided equitably ensures that minority and newly-founded religions shall not be discriminated against. At the same time 'equitable' implies that considerations such as the proportion of inmates belonging to or affiliated with a particular religion shall be relevant considerations in determining the amount of resources to be provided.

These proposals for possible inclusion in law are consistent with CSC's policy objective, which is to ensure recognition of the spiritual dimension of life by actively encouraging inmates to express their spirituality and exercise their religion.[61] The proposals would allow limits, however, based only upon pressing security concerns, whereas present policy relies on the "good order of the institution" test as a limit.

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[61] Commissioner's Directive 750: *Religious Services and Programs*, s.1.

PART II: RIGHTS BASED ON STATUS AS AN INMATE

As emphasized throughout this paper, the inmate's inherent dignity as a person must be respected in correctional law and practice. This has been stated as meaning that at all times procedures and practices for ensuring that an inmate's treatment is just, fair and humane must be reflected in law. The previous section dealt with individual rights which an inmate shares with all other individuals, by virtue of his or her status as a citizen and a member of society, and the limitations on these rights necessitated by incarceration. In this section, proposals will be presented for discussion in regard to rights which an inmate has by virtue of his or her status as an inmate, such as the right to be provided with the basics of care. Because society, through the operation of the criminal justice system, has deprived convicted offenders sentenced to a period of incarceration of certain rights, and has thereby increased their dependence on the state, the state must provide, as of right, the necessary food, shelter and care. In essence, the proposals aim to ensure that accommodation, food, medical attention, hygiene and safety all attain a satisfactory standard.

Ensuring that inmates are provided with the basics of care is conducive to an inmate's eventual re-integration into society: a feeling on the part of inmates that they are being treated fairly and that their dignity is not needlessly undermined is more likely to promote respect for society and its laws than harsh or inadequate treatment. This approach facilitates a further objective; namely, the reduction of tension within institutions which, in turn, eases frustrations and reduces confrontations, resulting in more easily managed institutions.

PROPOSALS REGARDING CONDITIONS OF CONFINEMENT

Physical Conditions

1 **Every inmate shall have a healthful and safe environment in which to live. Every correctional institution shall comply with the health, safety, sanitation and fire codes applicable to public buildings and shall be inspected regularly by independent inspectors.**

2 **The correctional authority shall ensure a reasonable standard of care in the protection of inmates from assault by other inmates and by staff.**

3 **In particular, but not as to limit the generality of the foregoing:**

- a) **all parts of the institution shall be properly maintained, and kept clean at all times;**

b) institutions shall be designed, structured and situated in such a manner that programs to fulfil the needs of inmates are facilitated;

c) all rooms in the institution shall have adequate and healthful space, heating, lighting and ventilation;

d) every inmate shall be provided with clothing adequate for warmth and health, according to the requirements of the season and the nature of his or her activities, including use at work where this is needed;

e) clothing provided shall be clean and kept in proper condition;

f) every inmate shall be provided with three nutritional meals each day; water fit for drinking shall be available to every inmate whenever he or she needs it;

g) every inmate shall occupy a cell or room by himself or herself, but if it is necessary for inmates to temporarily share a cell, each inmate shall be supplied with a separate bed;

h) every inmate shall be provided with clean begging, appropriate for the season;

i) every cell or other area occupied by inmates shall have a clean, functioning and private toilet and other facilities for the maintenance of personal cleanliness;

j) adequate bathing and shower facilities shall be provided; and

k) every inmate shall have the opportunity for at least one hour of daily recreation and physical exercise in the outdoors, when weather permits; otherwise, in indoor facilities.

Medical and Health Care

4. a). The standard of health care for inmates shall be the same as for the general population.

b) Every institution shall provide the services of qualified competent medical, psychiatric and dental officers.

Although services shall normally be provided during reasonable hours, emergency services shall be available at any time.

c) No health services shall be administered by persons who are not professionally recognized as competent to provide those services. No person who is not professionally qualified shall make a decision regarding an inmate's need for health services.

d) Every institution shall have ready access to all of the services of an accredited hospital.

e) Every inmate shall have the right to prompt medical attention when so requested, taking into account the nature of the problem and the institution's reasonable procedures for providing daily medical services.

f) The reasons for any disability, injury or illness shall not have any bearing on the provision of quality medical attention.

g) An inmate may obtain the services of a qualified physician of his or her choice for the treatment of medical complaints where the inmate pays for costs incurred.

Medical Records

5 a) Complete and confidential medical records shall be maintained in respect of each inmate. Where an inmate is transferred to another institution, his or her medical records shall be promptly transferred to that institution.

b) Complete records shall be maintained of the administration of all drugs to inmates. These shall include the type and quantity of the drug administered, and the date, time and reasons for its administration.

Right to Refuse Medical Treatment

6 a) Compulsory treatment of inmates can only be administered pursuant to applicable provincial legislation.

b) The inmate may voluntarily consent to medical treatment, provided:

i. the objectives of the treatment are clearly explained to the inmate-patient; and
ii. any known risks and dangers are also explained.

Access to Legal Materials

7 All inmates shall have access to legal materials.

8 In particular, but not so as to limit the generality of the foregoing:

a) every maximum and medium security institution shall have legal materials as specified in the *Regulations* (see Schedule A), to which inmates have access;

b) legal materials shall include adequate writing supplies and instruments;

c) each institution shall have at least one person on staff or available who is properly qualified and authorized for the taking of oaths;

d) inmates shall be entitled to acquire law books and other legal research materials from any source.

Schedule "A"

1. The most recent Revised Statutes of Canada and Regulations, with up-to-date annual volumes.

2. The most recent Revised Statutes and Regulations of the province in which the institution is located, with up-to-date annual volumes.

3. An up-to-date annotated *Criminal Code of Canada*, and related criminal statutes.

4. Criminal case reports: C.C.C.'s and C.R.'s

5. Most recently available basic textbooks on criminal law and procedure, correctional law, constitutional law and administrative law.

6. Correctional Caselaw Manual.

7. **The rules of procedure in the Federal Court of Canada.**

8. **The rules of procedure in the provincial courts in which the institution is located.**

9. **All Senate and/or House of Commons and/or Legislative Assembly reports on prison and/or parole; all relevant Royal Commissions, Commissions of inquiry; and any government reports on corrections which are made public.**

10. **Canada Law List.**

COMMENTARY

A) CONDITIONS OF CONFINEMENT

The proposals in this section are drawn largely from the UN Standard Minimum Rules for the Treatment of Prisoners. While there is little doubt that most facilities in Canadian penal institutions already do meet or exceed the standards for physical conditions outlined in this section, there is a constant need for vigilance in these most fundamental aspects of an inmate's existence, and they should be implemented in law to ensure that Canada meets international obligations.[62]

This section also requires correctional authorities to protect inmates, so far as reasonably possible, from assaults during the course of their stay in the institution. Homicide and assault, including sexual assault, are all too common in some of our correctional institutions, and in some instances become a major concern in the daily lives of some inmates. A reasonable standard of care in protecting inmates against violent attack is considered an appropriate onus to be placed on the prison administration. At the same time, in keeping with the principle that the least restrictive alternative should be used to achieve the correctional objective in question, measures such as extended lock-up of inmates would be justified only in extraordinary circumstances.

B) MEDICAL AND HEALTH CARE

The primary goal of these proposals is to ensure access to medical care within reasonable time periods. Although provisions for medical care in other jurisdictions are often cast in terms of the number of personnel needed for specific inmate populations, the Working Group has concluded that the essence of the standards is qualitative rather than quantitative.

The proposals emphasize that community standards governing care in other types of institutions, such as hospitals and nursing homes, are appropriate in the correctional setting. This care may be provided directly through medical personnel employed by the prison system, or equally, especially in smaller institutions, through contracts with existing health care facilities in the community. It is intended that this principle of standardized health care would cover specific aspects of medical service delivery such as annual medical examinations.

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[62] Report on the Standard Minimum Rules prepared for the Seventh UN Congress in 1985.

Issues related to the mental health of inmates will be examined in detail in the Working Paper on *Mentally Disordered Offenders*.

C) ACCESS TO LEGAL MATERIALS

Inmates' right to counsel has been discussed previously in relation to the disciplinary process. The provision in this section which mandates inmates' access to basic legal material is not meant to be a substitute for any right to counsel , but to supplement it by requiring maximum and medium security institutions to provide inmates with an adequate law library and access to other legal research tools. Recognizing the reality of legal service delivery systems, the Working Group is of the view that every inmate should have direct access to basic legal materials. An individual outside prison normally has the freedom to pursue legal remedies on his own without the assistance of counsel, or, indeed, in the face of adverse advice by counsel. Direct access to legal materials not only facilitates access to the courts but acts as an escape valve for relieving tensions and frustrations that could build up in inmates who are unable to have access to such material.

PART III: ENFORCING THE RULES

JUDICIAL REMEDIES

Of vital importance to inmate rights is the question of appropriate remedies for their breach. A discussion of non-judicial remedies (specifically inmate grievance systems and the ombudsman's office) follows this section. As well, accountability and discipline of the rules governing staff for breach of staff powers is canvassed in the *Staff Powers* Working Paper. Most minor and many major complaints may be resolved through these less formal processes. However the judicial system must always be available to an individual to challenge a denial of rights or abuse of power, to ensure that the rule of law is applied in our correctional system. The issues which must be addressed are:

- what purpose(s) is the remedy to serve?
- are the traditional judicial remedies adequate and appropriate to the correctional setting?
- are additional remedies needed for breach of statutory rights (i.e. are there aspects of the correctional system that are unique enough to require specific and unusual remedies)?

Despite certain technical complexities, in the vast majority of cases judicial remedies currently available generally provide an appropriate resolution to most of those problems which are not adequately dealt with by the informal methods mentioned above. These remedies can be grouped into four general categories:

1) civil action for negligence, assault, battery or trespass. Recovery in these cases is limited to damage provable, and the award is monetary compensation for damage flowing from the wrongful act;

2) administrative law remedies available to

    a) eligibility enforce compliance with a statutory duty (such as the Parole Board's duty to give each inmate a hearing at or prior to his or her parole date); and

    b) enforce any common law duty of administrative tribunals such as to act fairly. The remedy in administrative law cases is generally to send the matter back to the tribunal - to exercise its statutory duty in the proper fashion, or where the duty the duty of fairness has not been met, the court will quash the decision of the tribunal and order a new hearing by the administrative tribunal.

3) *Habeas corpus* is available to determine the validity of confinement of an inmate, both within the general inmate population or in administrative segregation.

4) criminal charges that may be laid if the breach of rules complained of constitutes a criminal act (e.g. assault). However, the sanction imposed by the criminal court is intended to punish and deter the offender from future criminal acts, and rarely involves any compensation for the victim.

The scope of judicial remedies for infringement of rights was expanded with the advent of the *Charter*. Section 24 provides a general remedy provision and a conditional exclusionary rule for evidence obtained in contravention of a *Charter* right:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Although s.24 expands the courts' jurisdiction to develop remedies appropriate to the situation, it only comes into play when a violation of the *Charter* is proven. In many instances a violation of a statutory rule does not constitute a *Charter* violation and therefore remedies for breach of statutory rules will have to be relied on. We must consider how broad such remedies should be.

One of the first issues to be considered is the purpose of the remedy - is it to compensate the injured party, punish and deter the violator, or ensure compliance with the rules? An ideal remedy would do all of these things. The Working Group believes that the remedy should, above all, be aimed at enhancing future compliance with the law. To this end, it will likely be appropriate to discipline staff internally for breaches of the rules. However, in addition, should the judiciary be empowered to order the staff member to personally pay compensation to the inmate, or formally apologize for improper behaviour? The experiences of labour boards and human rights commissions are instructive with respect to developing a variety of remedies for different situations - awards of costs, letters of undertaking to abide by the law in future, apologies to victims, etc., are all aimed at promoting compliance with the law.

A question that the Working Group wishes to raise for discussion is whether additional specific remedies should be legislated, or whether there is a need for a more general provision, framed along the same lines as s.24 of the *Charter* (appropriate and just remedy in the circumstances) to be considered for breaches of statutory rules. Such a provision might read:

> **Any person whose rights as set out in this *Act* have been infringed or denied, may apply to the Federal Court of Canada, and the Court may award such remedy as it considers appropriate and just in the circumstances.**

Legislating new specific remedies presents problems as it is difficult to anticipate all situations which may occur. However, consideration could be given to a provision specifying that any secondary sanctions attached to institutional decisions which are subsequently struck down must also be changed. Conviction for an institutional offence usually results in failure to earn remission, loss of privileges and sometimes loss of remission. It may be appropriate for a court, in quashing the institutional conviction, to direct the agency to remove all adverse consequences of conviction. Should this be specifically set out in legislation or made available under a general remedies provision?

Is monetary compensation appropriate in certain circumstances, or should we look at a reduction in time served to compensate for unfair treatment? What remedies are appropriate where a body cavity search is conducted on an inmate where there are no reasonable grounds to believe the inmate is secreting contraband; an inmate is denied appropriate medical care, but no long-term injury results; or a visitor is denied entry to an institution arbitrarily? A general remedy would allow the offended party an opportunity to request the redress he or she believes appropriate and give the judiciary full discretion as to what is "appropriate and just in the circumstances".

Access to the Courts

In conclusion, we wish to stress the primary importance of an inmate's access to the courts in enabling rights and remedies to become meaningful in a practical way. Whether the remedy sought in the court is intended to compensate, offer redress, compel performance of a duty, deter, punish or affirm fundamental values, it is essential that inmates be able to gain access to a court in the first place.

Throughout this paper we have attempted to put into place the elements necessary to ensure that inmates can enforce their rights in cases of non-compliance with rules. The section on access to legal materials is aimed at ensuring that inmates have access to materials which may indicate whether they have a case worth pursuing. The provisions on mail and visiting protect solicitor-client privilege. Along this line, an essential element is the *availability* of legal counsel. In the section on the disciplinary process we recognized the advantages of having legal counsel at disciplinary hearings and we proposed a statutory right to assistance.

Looking at inmate rights in a broader sense, we have argued first in the *Framework* Paper, as well as throughout this paper, that there is a need for rights to be protected in

Canadian correctional legislation. If such rights are to be effectively enforced, counsel must be available.

But who is to pay? Cost concerns are central to any discussion of availability of counsel. Unless either an inmate can afford to pay, or counsel for indigent inmates is provided under the legal aid system of the province, the right to counsel becomes meaningless. Legal aid schemes in some provinces provide duty counsel and other services to inmates on a regular basis, yet other provinces have refused to even provide counsel for disciplinary proceedings. A recent case from BC denies legal aid on the ground that, although *Howard* may give the right to counsel, "nothing is said of any reciprocal obligation to provide and pay for counsel".[63]

It must be noted, however, that resource implications affect the availability of legal aid to all citizens of certain provinces; it is not only inmates' access to legal aid that varies from province to province. While recognizing the complexities and the resource implications involved, we must ask whether the federal government's responsibilities for persons incarcerated in penitentiaries should include the provision of at least a minimum level of legal services.

NON-JUDICIAL REMEDIES

The previous section dealt with remedies which involve the use of the courts in the resolution of institutional grievances and disputes. As any correctional worker is aware, however, the vast majority of disputes and grievances which arise in the penal setting will never reach the courts. Too many grievances inevitably arise in the penitentiary setting for the courts to be able or willing to deal with them.

Nor would it be appropriate for the courts to review all of the many and varied complaints which inmates have about the way they are treated; complaints which frequently are of the most commonplace nature. Courts are too slow, costly and cumbersome a vehicle for the resolution of a great number of such disputes. However, inmate complaints cannot be treated as if they were trivial, even when they seem trivial to staff. Inmates' frustration over the perceived inability to get themselves heard, to establish lines of communication with the administration, and to have some say in the running of their own lives, can be among the most destructive forces within a penitentiary.

In this section, we will examine this need for effective grievance resolution mechanisms, and explore what is known about the most effective means of resolving complaints before they become bigger problems. We will not deal in detail here with avenues such as "privileged correspondence" - confidential mail from an inmate to an MP, the Solicitor General, etc. because these are not "remedies" in the sense of being enforceable means of redress, and because these are dealt with under inmate mail, earlier.

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[63] *Landry v. Legal Services Society* (1987), 28 C.C.C. (3d) 138 (B.C.C.A.).

(A) INMATE GRIEVANCE PROCEDURES

The proposed "correctional philosophy" statement set out in *Appendix A*, as well as the Criminal Law Review principles on which that proposed philosophy is in turn partially based, recognize the importance of effective complaint resolution procedures.

The *Criminal Law in Canadian Society* (*CLICS*), which establishes the basic framework for the review of the criminal law, in fact proposes, as Principles (j) and (k), that:

> j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;
>
> k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure.

The proposed correctional philosophy statement echoes these principles, and as will be seen later, suggests other principles which reflect some of the design aspects of successful grievance procedures in use.

Effective grievance procedures have been advocated by numerous official commissions and reports on corrections in Canada, including the Archambault Commission (1938) and the Swackhamer Report (1971). More recently, the 1977 *Report to Parliament* of the all-party Sub-committee on the Penitentiary System in Canada stated that "whether (inmate) grievances are justified or not, they require to be dealt with so that order and morale of institutions may be maintained". The Subcommittee recommended, with modifications, the inmate grievance procedure which is described later in this section.

The more recent standards for prison administration of the Canadian Criminal Justice Association advocate a grievance procedure which would "provide for an appeal to an impartial external body when alleged infringements of rights have not been satisfactorily resolved in the prison".

The Correctional Service of Canada's recent *Report on the Statement of CSC Values* (1984) also recognizes that "in our dealings with offenders we are proud to act in accordance with the duty to act fairly, and to see that those in our charge are provided a right of redress for our actions". The 1985 *Justice System* report to the Task Force on Program Review (Nielsen Task Force) noted "concerns about the effectiveness and timeliness of the (CSC) inmate grievance procedure", and concluded that "an improvement in the administrative remedies available to inmates before resort to the Correctional Investigator (discussed later) seems essential to greater effectiveness". One of the options suggested by the Study Team was to "revitalize the CSC inmate grievance procedure" to conform more to the model described by the 1977 Parliamentary Sub-committee."

Clearly, then, inmate grievance procedures have been considered important enough to deserve mention by several major inquiries and official reports. CSC Commissioner's Directives provide for an inmate and parolee grievance procedure which was originally based, in part, on the recommendations of the 1977 Parliamentary Sub-Committee Report. Let us examine the reasons why these various bodies have considered grievance procedures so important.

(I) WHY GRIEVANCE PROCEDURES ARE IMPORTANT

An alternative to litigation.

As suggested above, the courts are often a very slow, expensive, and cumbersome means for resolving prison disputes. For offenders serving brief terms, resort to the courts is effectively not available for most issues to be resolved before the offenders' release. Many of the matters which inmates find most irritating about prison life do not, in fact, reach the level of a "right", but if left unresolved, will cause greater problems later on. Just as importantly, solutions imposed by the courts will not always be ideal ones from the point of view of either the inmate or the administration, since they will not benefit from a full understanding of prison life or the individual problems which arise. If the two parties can agree on a solution before or instead of bringing the matter to court, that solution is usually more workable and more acceptable to both parties than a court-imposed solution would be. Finally, the resort to litigation leaves staff with the feeling - justified or not - of having lost some of the authority and discretion needed to perform their duties. If sensible solutions can be found - and experience suggests *they* can - without resort to courts, both staff and inmates are left with the feeling of having greater control over their lives.

Institutional climate of fairness.

This objective was emphasized by the Parliamentary Sub-committee. A grievance procedure which preserves the appearance and reality of fairness prevents much of the feeling of frustration and bitterness experienced by inmates, and emphasizes to all parties that they are responsible for reaching workable solutions. In contrast to the impact of litigation, the effect of a grievance procedure based on negotiation and mediation can leave parties an all sides feeling they have a voice in running their own lives. In addition, decisions "end to be more effectively carried out when the persons affected have helped to formulate them.

Reformative impact on inmates.

A fair and effective grievance procedure can encourage inmate rehabilitation by encouraging self-reliance and responsibility, teaching problem-solving skills, and serving as an example for treating others fairly.

Legitimate means of inmate protest.

Having available a legitimate, effective means of airing complaints and disputes gives inmates an alternative to undesirable forms of expression, such as self-mutilation, fighting and damaging prison property. Evaluations show that inmate assaults on staff and on other inmates decrease when this procedure is used.

Manager's early warning system.

An inmate grievance procedure with a proper record-keeping system and "bring forward" procedure attached will improve communications, help correctional administrators identify recurring sources of inmate complaints, and allow opportunities to correct problems before they get out of hand.

Commissioner's Directive No. 081 currently provides for a procedure for resolving inmates' grievances, and CO 082 for parolees' grievances. The procedure's stated objective reflects the concerns reviewed above for prompt and fair resolution of complaints, whenever possible "at the lowest level" - that is, at the level where problems occur and can often be expeditiously solved. It differs, however, in several important respects from the "exemplary procedure" proposed below for possible inclusion in law. For example, unlike the proposed procedure, it appears to require the inmate to attempt informal resolution of his complaint before Filing a written complaint or grievance; it excludes from the procedure matters for which other review procedures exist; and the outside review board members are selected by the Director of the penitentiary, not through methods which derive from the arbitration field.

(II) EXEMPLARY PROCEDURE

The inmate grievance procedure described below has been found to be effective in resolving prison disputes fairly in institutions where it has been properly implemented. In 1975, this procedure was designated by the US Department of Justice as an "exemplary project" - one of special usefulness and quality. In 1984, it was advocated by the US National Institute of Corrections as an alternative dispute resolution mechanism in a reference manual for correctional managers on how to "avert litigation". It is, with modifications, the program recommended by the Parliamentary Sub-committee of 1977 and, again with modifications, the program on which the CSC inmate grievance procedure was based. It is a difficult model to implement properly, and as the Nielsen Task Force Study Team notes, can fall into disuse and present other difficulties.

The model procedure described below is based on principles of negotiation between the parties (staff and inmates) and mediation (attempts by a third party to get the parties to arrive at a solution themselves), and if necessary (usually in only about 1% of cases), arbitration (resolution of a dispute by an external third party acceptable to both sides). It is normally possible for the parties to find sufficient common ground to arrive at a solution which both sides can live with. In fact, research on the procedure suggests that the outcome of most grievances resolved through this method is a compromise reached by an unanimous agreement of the individuals involved.

This point is worth emphasizing because it speaks to two major concerns of staff. First, staff who are unfamiliar with the procedure tend to fear that unworkable solutions will be the result of the process; and second, staff often find the "trivial" nature of many inmate grievances irritating and even vexatious. In fact, as suggested earlier, such grievances usually do matter a great deal to the grievant, and the solution to most grievances becomes obvious when they are examined in detail. When the two parties - staff and inmates - are required by the process to discuss the matter with the help of a mediator, the obviousness of the solution becomes clear.

The stages involved in the process proposed here are typically the following. The grievant files a written grievance, usually with the help of an inmate grievance clerk, who plays an important role in the process. The clerk assists the inmate to articulate the problem in writing - a difficult matter for many inmates - and in sufficient detail to make the complaint and the requested solution understandable. The clerk also assists inmates in seeking informal resolutions to their grievances. Frequently, a similar grievance has been filed in the past, and the clerk can advise the inmate accordingly. In addition, the existence of the inmate clerk helps make the procedure less threatening to inmates.

An attempt may be made informally to resolve the grievance through mediation between the inmate and the staff member most closely connected to the subject matter being grieved. Since, as has been seen, many grievances are rather minor in nature and their solution rather obvious, it is often possible for an informal discussion to result in a satisfactory solution. An attempt at informal resolution should not be mandatory, however, nor a prerequisite to the use of the formal process described below. Otherwise the informal resolution stage may deteriorate into a series of imposed rather than mediated solutions, and research shows that inmates typically report a lesser degree of satisfaction with outcomes reached informally than with outcomes reached through the full process.

The first step in the formal process is a hearing at which all parties are given an opportunity to participate in the resolution of the grievance. This hearing is held before a committee of equal numbers of appointed staff arid elected inmates, with a non-voting chairman or mediator. This committee is intended to hear all sides of the dispute and encourage a negotiated solution, if the parties can be persuaded to agree on one. It is usually best if the committee works on a living unit (rather than institution-wide) basis in order that a significant number of staff can become involved in it on a rotational basis, and in order that "local" solutions can be reached.

The subsequent levels of review within the correctional system should reflect the relevant levels of the department, but should not be numerous enough to make the procedure cumbersome and delays lengthy. Where a grievance involves challenges to regional or national policies, however, these levels should always have the opportunity to review the grievance. Any party to a grievance may appeal the decision of any level to the next level in the procedure. All responses to a grievance should be in writing, with reasons given for decisions and a deadline established for follow-up, if applicable. Reasonably brief time limits should be imposed for responses at each level and, unless the inmate agrees otherwise, the violation of time limits should permit the inmate to proceed to the next level automatically. Lack of a written response or the failure to carry out the agreed upon solution should also entitle the grievant to proceed to the next level.

The final review should be to an independent party, one external to the correctional authority and the inmate body. Often, this independent is drawn from a list of persons previously agreed to as acceptable to both staff and inmates. The independent review authority could also be an ombudsman, although this would be a deviation from the traditional role of an ombudsman. The decision of the outside reviewer should be final unless it would be contrary to law, would endanger any individual, or would require funds not available in the current budget. Some jurisdictions have enshrined their grievance procedure in law and given the decisions of outside review boards the force of law. Although experience shows that the independent review level is required in only about 1% of all cases, it is the most critical element in ensuring credibility, and in encouraging the parties to work hard at finding workable solutions at earlier levels.

There should be a special fast-track system available for handling grievances considered to be an emergency. The procedure should also include a guarantee of no reprisals for grieving, and grievance forms should not appear on permanent inmate files. The procedure must be evaluated regularly and monitored carefully to ensure that it is working as intended. Any elements in a grievance which could result in disciplinary action against a staff member should be referred directly to the institutional head for investigation and prompt written report to all concerned parties. (See also the Working Paper on *Powers and Responsibilities of Correctional Staff* for a discussion of procedures for ensuring staff accountability.) The grievance procedure itself should be the means for deciding whether any given matter is "grievable". The main question for discussion is whether the law should include inmate grievance procedures along lines similar to the following:

(III) PROPOSED INMATE GRIEVANCE PROCEDURE

Objective

1 **There shall be an inmate grievance procedure established at each penitentiary whose purpose shall be to provide a fair and timely means to resolve grievances about matters falling within the responsibility of the Commissioner of Corrections.**

Procedure

2 Once a grievance has been filed, there may be an attempt to resolve the matter informally, without reference to the grievance resolution committee. There shall be no requirement for such informal resolution, however, and attempts at informal resolution shall not in any way prejudice the grievant's right to be heard through the formal grievance resolution process.

3 The Commissioner shall establish, at each penitentiary under his or her jurisdiction, grievance resolution commit tees to hear and resolve grievances of persons within the penitentiary. Such grievance resolution committees shall consist of equal numbers of staff appointed by the institutional head and inmates elected by their peers, as well as a non-voting chairperson.

4 The Commissioner shall promulgate rules and regulations establishing procedures for the fair, simple and expeditious resolution of grievances, including but not limited to setting time limitations for the filing of complaints and replies thereto for each stage of the grievance resolution process.

5 A person aggrieved by the decision of a grievance resolution committee may apply to the Commissioner for review of the decision. The Commissioner or his or her delegate may take such action as he or she deems appropriate to resolve the grievance fairly and expeditiously to the satisfaction of all parties. If the resolution of the grievance by the Commissioner or his or her delegate is deemed unsatisfactory by any party to the grievance, that party shall have the option to refer the matter to an independent arbitrator. The decision of the independent arbitrator shall be binding unless it is established to the satisfaction of the Federal Court that such a decision would be contrary to law, would represent a clear danger to any individual or group of individuals, or would require funds not available in the current budget. In the latter case, the Commissioner shall present to the Court a plan for the implementation of the decision in future fiscal years.

6 The Federal Court has jurisdiction to hear and determine an application to review and set aside a decision or order made by an independent arbitrator upon the ground that the arbitrator:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise his or her jurisdiction;

b) erred in law in making his or her decision or order, whether or not the error appears on the face of the record; or

c) based his or her decision or order on an erroneous finding of fact which he or she made in a perverse or capricious manner or without regard for the material before him or her.

7 There shall be no reprisals for the use of the grievance procedure. Copies of grievances shall not be placed on files which form part of the case documentation for significant decisions made about the offender, such as transfer and release.

8 Replies to all grievances shall be made in writing and shall detail the reasons for the decision and the deadline for action to be taken on the grievance, if applicable.

9 Those elements of a grievance which could result in disciplinary action against a staff member shall be referred to the institutional head for proper action through the normal procedure for staff discipline. No findings or recommendations regarding staff discipline shall be made by a grievance resolution committee or an independent arbitrator, nor shall the outcome of any inmate grievance be used as a basis for staff discipline.

COMMENTARY

This draft legislation embodies the key design principles for the model which it has been shown must be observed if the procedure is to operate as intended and resolve grievances successfully.

First, the model must be based on *participation by both staff and inmates in the design and operation of the procedure*. The detailed procedures must not be imposed by management, but rather should be written by line staff - ideally, security or living unit - and inmates at each institution, because these are the parties who must live with them. As many staff as possible should also be involved in the operation of the procedure, through rotational duty on the committee. Inmate participation is critical to ensure the model's credibility with inmates; it has also been found that greater inmate participation discourages frivolous grievances, and the greater the inmate participation in the procedure, the less work there is for staff, and therefore the more staff support there is for the model. There must also be strong support for the model from top management within the institution and the correctional agency as a whole.

Equally important is the *participation of an outsider in the independent review level.* This individual must not be appointed by the administration, but by agreement of the parties. In California Youth Authority institutions, independent review is by volunteer members of the American Arbitration Association. Often, it is helpful for a staff representative and an inmate representative to sit with the independent reviewer on the final review, in order to ensure that the independent reviewer fully understands ail the facts and the dynamics of the situation, particularly the security requirements of the institution.

Although independent review is often feared by staff, who question whether security concerns will be given sufficient consideration, experience in other jurisdictions suggests that correctional authorities which use it are quickly reassured by the fairness and reasonableness of the solutions decided by outsiders.

Third, *the procedure must be clear and easy to use.* Complex procedures discourage inmates and create frustration on all sides. The clearer the procedure, the easier it is to solve problems at early stages.

Thorough training and orientation for staff and inmates is also essential to the success of the procedure. All participants - clerks, committee members, coordinators, warden - should receive a solid grounding in the principles behind the model and the techniques of mediation and negotiation. This is particularly important because some staff will object at first to sitting at the same table as inmates, and it must be understood that for the model to be successful, all concerned parties have to work together to settle disputes.

Implementing this procedure properly can take months to achieve, and keeping it on track is an ongoing responsibility. However, those jurisdictions which have used it properly are strong proponents of the procedure.

As noted above, Commissioner's Directives already provide for a procedure for CSC inmates and parolees which is similar in many important respects. The key differences would be that virtually all matters falling within the responsibility of the Commissioner would be grievable, with the exception of grievances which could result in disciplinary action against staff; that all grievances involving matters of national policy (i.e., CDs) would be reviewed at the Commissioner's level; that there would be no requirement for the inmate to attempt to resolve his or her complaint informally before filing a written grievance; that the independent review level members would be selected according to principles of arbitration; and that their decisions would be binding unless they were contrary to law, would represent a clear danger to any group or individual, or would require funds not available in the current budget.

B) CORRECTIONAL INVESTIGATOR

An ombudsman is a government-appointed official who has extensive powers to investigate citizen complaints against government action. He or she investigates complaints, reports on his or her findings to the complainant and to the government authority in question, and makes his or her findings public.

In Canada, all the provinces but Prince Edward Island have an ombudsman, who receives complaints from all citizens, including prisoners. There is an ombudsman at the federal level who deals exclusively with the complaints of federal inmates, the Correctional Investigator. The Correctional Investigator varies somewhat from the traditional ombudsman mould in that he or she reports to the Solicitor General, not to Parliament. The Office is not authorized by specific legislation but derives its powers from the *Inquiries Act*, under which the Correctional Investigator is appointed. He or she serves at pleasure.

Ombudsmen typically receive a large percentage of complaints from inmates. They are able to be of assistance in some cases, but do not consider their offices adequate to the task of taking on all inmate complaints. The 1977 Parliamentary Sub-committee called the office of the Correctional Investigator "a small response to a very large problem". From time to time, it has been suggested that changes should be made to the Office of the Correctional Investigator, in order to enhance the independence of his or her role from correctional authority. These suggested changes include: separate statutory creation of the Correctional Investigator's office; explicit legislative mention of the powers of the Office; appointment for a term of years, not "at pleasure" of the Governor in Council; reporting directly to Parliament on an annual and as-needed basis; and provision for necessary staff and contracting authorities. The proposal for a Special Report in addition to the annual Report is designed to give the Correctional Investigator speedy access to Parliament in those rare cases where the issue is so serious that waiting for the next annual report would be unsatisfactory.

Legislative Option Regarding Office of Correctional Investigator

1 **The Governor in Council may appoint a person to be known as the Correctional Investigator of Canada. The Correctional Investigator shall hold office during good behaviour for a term of five years, but may be suspended or removed for cause at any time by the Governor in Council.**

2 **The Correctional Investigator has the control and management of all matters connected with the Office of the Correctional Investigator, including the use of such officers and employees as are necessary to enable the Correctional Investigator to perform the function and duties of the Office.**

3 **It is the function of the Correctional Investigator to conduct investigations into the problems of inmates related to their**

confinement or supervision on temporary absence, day parole, parole or mandatory supervision. In performing this function, the Correctional Investigator may investigate any decision, recommendation, act or omission of the Commissioner of Corrections or any person under the control and management of, or performing services for or on behalf of, the Commissioner of Corrections that affects inmates either individually or as a group.

4 **In the course of an investigation, the Correctional Investigator may hold any hearing and make such inquiries as the Correctional Investigator considers fit, but no person is entitled as of right to be heard by the Correctional Investigator.**

5 **In the course of an investigation, the Correctional Investigator may require any person:**

- **a) to furnish any information that, in the opinion of the Correctional Investigator, the person may be able to furnish in relation to the matter being investigated; and**
- **b) to produce, for examination by the Correctional Investigator, any document, paper or thing that, in the opinion of the Correctional Investigator, relates to the matter being investigated and that may be in the possession or under the control of that person.**

6 **In the course of an investigation, the Correctional Investigator may summon and examine on oath**

- **a) where the investigation is in relation to a complaint, the complainant, and**
- **b) any person who, in the opinion of the Correctional investigator, is able to give any information relating to the matter being investigated, and for that purpose may administer an oath.**

7 **The Correctional Investigator may, on satisfying any security requirements applicable thereto, at any time enter any premises occupied by or under the control and management of the Commissioner of Corrections and inspect the premises and carry out therein any investigation or inspection.**

8 When informing the Commissioner of Corrections of a problem, the Correctional Investigator may make any recommendations the Correctional Investigator considers appropriate.

9 The Commissioner of Corrections shall advise the Correctional Investigator within 45 days of receiving a recommendation what action will be taken with respect to the recommendation.

10 The Correctional Investigator shall, within three months after the end of each fiscal year, submit to the Solicitor General a report in both official languages of the activities of the Office of the Correctional Investigator during that year and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which the House is sitting after the Solicitor General receives it.

11 If within a reasonable time after the Correctional Investigator has informed the Solicitor General of a problem no action has been taken which seems to the Correctional Investigator to be adequate and appropriate, the Correctional Investigator may submit a special report to the Solicitor General about the problem and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

APPENDIX "A"

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Native Offenders

Mentally Disordered Offenders

Sentence Computation

The Relationship between Federal and Provincial Correctional Jurisdictions

International Transfer of Offenders

APPENDIX "B"

STATEMENT OF PURPOSE AND PRINCIPLES OF CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented *by* the offender;

c) encouraging offenders to ado3Dt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted *by* the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

APPENDIX "C"

SUMMARY OF RECOMMENDATIONS

I. General Provisions For Fairness In Institutional Decision-Making

Objective

1 To ensure that the requirements of procedural fairness are complied with in decisions affecting an inmate's liberty or other interests.

General Rule

2 When making a decision which affects the liberty or other rights or interests of an inmate, the institutional authorities shall ensure that the greater the impact on the inmate the greater the procedural protections provided.

Inmate Access to Information

3 Where a decision affects an inmate's liberty or other interests, the inmate shall be entitled to all information which is relevant to his or her case. However, where the decision-maker receives information which

a) could reasonably be expected to threaten the safety of individuals;

b) could reasonably be expected to be injurious to the security of penal institutions; or

c) could reasonably be expected to be injurious to the conduct of lawful investigations or the conduct of reviews pursuant to the *Penitentiary* or *Parole Acts*, or the *Penitentiary Service* or *Parole Regulations,* it need not disclose the information, if after

   (i) taking all available steps to confirm the accuracy of the information;

   (ii) considering the effect of disclosure on the source of the information or on a third party, or on an ongoing investigation or review; and

   (iii) considering the inpact of non-disclosure on the applicant's opportunity to respond to matters at issue it is satisfied that the information should not be disclosed.

4 Where information is not disclosed pursuant to section 3, the inmate shall be provided with specific reasons or grounds for non-disclosure and with the gist of the information.

II PROVISIONS RELATED TO TRANSFER OF INMATES

Objective

1 To meet the security requirements and program needs of individual inmates while recognizing the impact of a transfer decision on an inmate's liberty and other interests.

Authority

2 The Commissioner or any officer directed by the Commissioner may transfer an inmate in accordance with the provisions of this part.

Reasons for Transfers

3 The transfer of an inmate my take place for one or more of the following reasons:

a) to respond to reassessed security requirements;
b) to provide access to the home community or an compatible cultural environment;
c) to provide access to relevant programs;
d) to provide adequate medical or psychological treatment;
e) to provide adequate protection;
f) to relieve serious overcrowding; and
g) to respond to an inmate's application for transfer.

Involuntary Transfers

4 Before being transferred involuntarily, an inmate shall be informed, in writing, of the proposed involuntary transfer and the particular allegations on the basis of which the transfer is being proposed, and of the fact that he or she is entitled to respond to the proposal, in person before the institution head, or, if the inmate prefers, in writing, within 48 hours.

5 The inmate's response to a proposal of involuntary transfer shall be reviewed by the Commissioner or a senior regional official and the inmate shall be informed of the decision reached. When the involuntary transfer is to proceed despite the inmate's objection, reasons for the decision shall be given.

6 In an emergency situation, a transfer may take place without prior notification to the inmate. In such cases, the inmate shall be informed of the reasons for the transfer and the particular allegations on which it is based within 48 hours of the transfer and shall have the opportunity to respond, in person, within 48 hours.

III. PROVISIONS RELATED TO ADMINISTRATIVE SEGREGATION

Objective

1 To ensure that inmates who must, for a limited period of time, be kept from associating with other inmates are confined as a result of a fair and reasonable decision-making process, in a secure and humane fashion, and returned to normal association as soon as possible.

Placement in Segregation

2 An inmate may be segregated where the institutional head or his designate is satisfied that no other reasonable alternative exists, and:

- a) there are reasonable grounds to believe that the inmate has committed, attempted to comnit, or plans to commit acts that represent a serious threat to the security of the institution or the safety of individuals; or
- b) disciplinary or criminal charges have been laid involving actual or threatened violence or an associated threat of reprisal or destruction of goverment property and there is a substantial likelihood that the offence will be continued or repeated or there will be violent reprisals by other inmates; or
- c) there are reasonable grounds to believe that the presence of an inmate in normal association would interfere with the investigation of a criminal or serious disciplinary offence through that inmate's intimidation of potential witnesses; or
- d) there are reasonable grounds to believe that an inmate's presence in normal association represents a risk to the good order of the institution in that the inmate has refused to obey the lawful order of a staff member or officer and there is a substantial likelihood that the refusal will be repeated or will lead to widespread disobedience by other inmates; or
- e) there are reasonable grounds to believe that the inmate's life is in danger.

3 An inmate placed in administrative segregation shall be informed, in writing, of the reasons for the placement in segregation within 24 hours of placement.

4 Where an officer other than the institutional head has ordered administrative segregation, the institutional head shall, within 24 hours of placement, review the order and either confirm the placement in segregation or issue a further order directing that the inmate be released from segregation.

Conditions of Confinement

5 An inmate placed in administrative segregation shall not be considered under additional punishment and shall be accorded the same conditions of confinement and rights and privileges as the general population except for those that can only be enjoyed in association with other inmates, including but not limited to:

e) correspondence;
f) personal effects;
g) clothing, bedding, and linen and exchange thereof;
h) personal hygiene, including opportunities to shave and shower;
i) canteen;
j) borrowing from the institutional library and receiving reading material from outside the institution;
k) access to legal materials and legal services; and
l) daily exercise.

Reasonable access to visiting and telephone calls to persons or agencies outside of the institution shall be provided.

6 Inmates who have been placed in administrative segregation shall be provided with:

d) case management services;
e) educational, spiritual and social development activities;
f) psychological counselling; and
g) administrative and health care services.

Review of Administrative Segregation

7(a) A review of the case of each inmate placed in administrative segregation shall take place within 3 days of the initial placement and no less frequently than once a week thereafter.

1 The review shall be carried out by a Segregation Review Board consisting of the Assistant Director (Security) or Assistant Director (Socialization); the Classification Officer or psychologist in charge of segregation; the security officer in charge of segregation; and an independent outside person.

2 Each inmate shall be notified at least 24 hours in advance of the review and shall be permitted to present his or her case in a hearing before the Segregation Review Board.

3 The board shall consider whether there are continuing grounds for segregation according to the criteria in section 2 and shall recommend in writing to the institutional head either that segregation be continued or that the inmate be returned to the general population.

4 A copy of the recommendation shall be given to the inmate.

5 The institutional head retains the final authority to make the decision (subject to 8(b)). In a case where the institutional head does not intend to act in accordance with the recommendation of the Board that an inmate be returned to the general population, the institutional head shall inform the inmate in writing of the reasons for his or her intended decision and provide the inmate with an opportunity to present his or her case for release into the general population.

6 Where the inmate continues to be segregated, the Segregation Review Board shall develop a plan to re-integrate the inmate into the general population of the institution as soon as possible, and shall monitor the plan during subsequent reviews. The inmate shall have an opportunity to make representations as to the proposed plan.

8(a) Where segregation is to be continued beyond 30 consecutive days the Segregation Review Board shall hear the evidence of a psychologist or psychiatrist who has assessed the inmate.

b) Where the psychologist or psychiatrist presents evidence that continued segregation will cause the inmate substantial psychological or physical harm, the institutional head shall order the inmate's return to the general population, unless return would be an immediate danger to life or safety.

Maximum Time In Administration Segregation

9 No segregation shall be continued for more than ninety days unless

a) during this period the inmate commits further acts which under section 2 justify further segregation. Any further period of segregation shall also be subject to a ninety day limitation; or,

b) no reasonable alternative exists and the inmate must remain in the institution to attend court proceedings.

IV. INMATE DISCIPLINE

Objective

1 To foster an environment in which inmates conduct themselves according to acceptable and approved standards of behaviour thereby promoting good order in the institution and contributing to their successful reintegration into the community, through a fair and reasonable disciplinary process.

Offences

2 Every inmate commits an offence who:

a) wilfully disobeys a lawful order;
b) wilfully breaches a regulation or written rule governing the conduct of inmates;
c) commits or threatens to commit, an assault against another person;
d) d behaves towards any other person, by his or her actions, language or writing, in a threatening or extrerrely abusive manner;
e) takes or converts to his or her own use or that of another any property or article without the consent of the rightful owner or other person in lawful possession of the property;
f) wilfully or negligently damages any property of Her Majesty or of any other person;
g) has contraband in his or her possession;
h) deals in contraband with any other person;
i) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant within the institution or when prohibited as a condition of any release from, custody;
j) participates in, creates or incites a disturbance likely to endanger the security of the institution;
k) does any act with intent to escape or to assist another inmate to escape;
l) leaves his or her cell, place of work or other appointed place without proper authority;
m) gives or offers a bribe or reward to any person;
n) is in an area prohibited to inmates;
o) wilfully wastes food; or
p) attempts to do anything mentioned in paragraphs a) to o).

Definitions

3 "Contraband" consists of any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head to have the item in his or her possession.

"Intoxicant" consists of any substance, not on the approved list distributed to each inmate that, if consumed, absorbed, swallowed, smoked, inhaled, injected or otherwise used, would result in intoxication.

Manner of Proceeding

4 Where a staff member has reasonable and probable grounds to believe an inmate has or is committing a disciplinary offence, the staff member shall, where circumstances allow:

a) stop the commission of the offence and explain to the inmate the nature of the breach, and

b) where a person aggrieved by the alleged breach consents, permit the inmate to correct the breach where possible and make amends to the person aggrieved.

5 Where a staff member has reasonable and probable grounds to believe an offence has been or is being committed and where it cannot be resolved informally as in section 4, the institutional head or the staff member designated by the institutional head shall determine whether, depending on the circumstances surrounding the offence, to charge the inmate with a minor or serious violation, or to inform the police force having jurisdiction.

Procedures

6 An inmate charged with a disciplinary offence shall:

a) receive in writing notice of the date, time and place of his or her disciplinary hearing, and the specific charge and whether it is designated as minor or serious, not less than twenty-four hours in advance of the hearing;

b) have the charge described in sufficient detail to permit the inmate to know exactly what behaviour has lead to the charge;

c) be entitled to a hearing within seven working days of written notice of the offence;

d) have access to an interpreter, if necessary;

e) have the opportunity to be present and to be heard;

f) be entitled to assistance from another person or persons of the inmate's choice where the offence is designated as serious, provided the person has been approved for entry into the institution;

g) have the opportunity to question witnesses and call witnesses on his or her own behalf; and

h) have the opportunity to make submissions with respect to punishment in the event of a conviction.

7 An inmate charged with a minor offence shall appear before the institutional head or his/her delegate; and an inmate charged with a serious offence shall appear before an independent chairperson.

8 All proceedings related to the hearing of serious offences shall be recorded; those related to a minor offence shall be summarized.

9 The standard of proof required for conviction for any disciplinary offence shall be proof beyond a reasonable doubt.

10 A disciplinary conviction or acquittal is determinative of issues of fact relevant to subsequent institutional decisions.

Penalties

12(a) An inmate found guilty of a serious offence is subject to one or more of the following:

- (i) a warning or reprimand;
- (ii) the loss of privileges;
- (iii) a fine of not more than $50.00;
- (iv) reimbursement of up to $500.00 for the amount of damages caused wilfully or negligently;
- (v) a work order for a specified number of hours, not to exceed 100;
- (vi) dissociation from other inmates for a period not exceeding (seven) consecutive days.

b) An inmate found guilty of a minor offence is subject to one of the following:

- (i) a warning or reprimand;
- (ii) the loss of privileges;
- (iii) reimbursement up to a maximum of $50.00 for the amount of damages caused wilfully or negligently.

b) The presiding officer of the disciplinary court may, in the casse of a serious offence, suspend the carrying out of the sentence on the condition that the inmate is not found guilty of another serious offence during a specified period not exceeding ninety days from the date of the order. Where this condition is not complied with, the suspended punishment shall be carried out.

Independent Chairpersons

12(a) The Minister shall appoint an independent chairperson, other than an official of the Service, to preside over the hearing and adjudicate charges of offences designated serious.

b) The independent chairperson shall have relevant experience in the practice of criminal law, or experience with adjudicative bodies.

13 The Minister shall appoint a person other than an official of the Service to serve as Chief Independent Chairperson for each region of the Correctional Service of Canada whose duties shall include:

- a) hearing appeals on matters of process and substance, for both convictions and sentence; and
- b) monitoring and promoting consistency in dispositions.

V. PROPOSAL REGARDING SEARCH OF INMATES

Objective

1 To authorize and regulate search procedures necessary to maintain a safe, secure environment while ensuring respect for the inmate's privacy and other rights.

Definitions

2 The following definitions shall apply to all searches of inmates:

"Contraband": any item that is not on an approved list distributed to each inmate upon reception, unless the inmate has obtained written permission from the institutional head or his/her designate to have the item in his or her possession.

"Administrative search" or "inspection": the power to conduct a routine search of a person, place or vehicle without individualized suspicion, and to seize contraband or evidence of an offence, to ensure compliance with security requirements or health and safety standards of the institution.

"Investigative search": the power of search and seizure where there are reasonable grounds to believe or suspect that a person, place or vehicle is carrying or containing contraband or evidence of an offence.

Search of a Person

Personal search may include the following:

"Walk-through scanner": a procedure in which the person being searched is required to walk through a metal detector scanner or be subjected to a similar non-intrusive search by technical means.

"Frisk search": a hand search of a clothed person from head to foot, and includes the method of searching by use of hand-held scanning device. If necessary, a frisk search may be expanded to require the person being searched to open his or her mouth, raise, lower, or open outer garments of clothing to permit a visual inspection.

"Strip search": a procedure in which the person being searched is required to undress completely before a staff member, and as well the person may be required to open his or her mouth, display the soles of his or her feet, present open hands and arms, and bend over to allow a visual inspection. In addition, all clothing and things possessed in the clothing may be searched.

"Urinalysis": a procedure in which the person being searched is required to provide a urine sample by the normal excretory process to a qualified technician for scientific analysis by an approved instrument.

"Manual body cavity search": a procedure in addition to a strip search which includes the physical probing of the rectum or vagina.

Search of Inmates

4(a) All searches are to be conducted in circumstances respectful of the privacy and dignity of the inmate to be searched. A strip search shall only be conducted by a staff member of the same sex as the inmate, and shall take place in a private area out of the sight of others, except for a witness of the same sex. A manual body cavity search shall only be performed by a qualified medical practitioner upon written authorization of the institutional head.

b) Where a staff member seizes things he or she shall issue a receipt to the inmate. The staff member shall bring the things seized to a senior official and file with him or her a full report including the time and place of the search and seizure, the names of the inmate and staff members conducting the search, the reason why the search was made, and a description of the things seized. The report, subject to the limitations in s.3 of the provisions or, inmate access to information, shall be available on request to the inmate who was searched.

c) A staff member who conducts an investigative strip search in which nothing is seized shall be required to file a post-search report with a senior official. The report shall include the time and place of the search, the names of persons involved, and the reason for the search. The report, subject to the limitations in s.3 of the provisions on inmate access to information, shall be available on request to the inmate who was searched.

d) Copies of the report shall be maintained.

Administrative Routine Search

4(a) A staff member of either sex may conduct a routine walk-through scanner search or a frisk search of an inmate
- i immediately prior to the inmate's leaving or on his or her entry or return to the institution;
- ii immediately prior to the inmate's entering or on leaving the open visiting area of an institution; where the inmate is leaving a work or activity area; and
- iii where the inmate is on a temporary absence outside the institution.

b) A staff member may conduct a routine strip search of an inmate
- i) on an inmate's return to an institution;
- ii) immediately on leaving the open visiting area of an institution; and
- iii) on an inmate's leaving work areas in a situation where the inmate has had access to items which may constitute contraband that is of a nature which may be secreted on the body.

c) If a staff member, in the course of a lawful administrative search, discovers contraband or evidence of an offence he or she may seize it.

Investigative Search

5(a) A staff member of either sex may conduct a frisk search of an inmate where he or she has a reasonable suspicion that the inmate is carrying contraband or evidence of an offence. A reasonable suspicion is a subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent staff member to suspect a particular person is concealing contraband on his or her body.

b) Where a staff member has reasonable grounds to believe that an inmate has or is committing the offence of using an intoxicant and that a urine sample is necessary to provide evidence of the offence, he or she may demand that an inmate submit as soon as possible to a urinalysis, carried out by a qualified technician. A sanmple shall be provided to the inmate upon request.

c) Where a staff member believes on reasonable grounds that the inmate is carrying or evidence of an offence and that a strip search is necessary to detect the presence of the contraband or evidence, and he or she so satisfies his or her superior, the staff member may conduct a strip search.

d) Where a staff member, in the course of a lawful investigative search, discovers contraband or evidence of an offence, he or she may seize it. However, if during a strip search the staff member discovers contraband secreted in an intimate body cavity, he or she must obtain authorization for a manual body cavity search. A manual body cavity search shall only be authorized where the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband within an inmate body cavity and that such a search is necessary to detect and seize the contraband.

Search of Cells and Other Areas

6 If a staff member in the course of a lawful cell search discovers contraband or evidence of an offence he or she may seize it.

Administrative Search

7 Routine searches of cells and activity areas may be conducted without specific grounds on a periodic basis by staff members in accordance with a search plan providing for random, thorough searches. An inmate representative shall be present when search of a cell is conducted.

Investigative Search

8(a) A staff member who has a reasonable suspicion that contraband is located in an inmate's cell may, with written authorization from a supervisor, enter the cell and conduct a search of the cell and its contents.

b) Where the staff member in s.8(a) believes on reasonable grounds that the delay to obtain written authorization would result in loss or destruction of the contraband he or she may enter the cell and search for contraband without prior written authorization.

Emergency Search

9(a) Where an uprising or similar emergency has occurred in the institution, necessitating a general lock-up whereby all inmates are confined to their cells, and there are reasonable grounds to believe that weapons, contraband or evidence relating to the emergency are to be found, a general shakedown of inmates, cells and other areas may be conducted incident to the lock-up on written authorization of the institutional head.

b) in the case of a shakedown search the staff members performing the search shall file a post-search report with the institutional head. The report should include the names of all staff members conducting the search, a list of all persons, cells and areas searched, and a description of any things seized. The portions of the report, that pertain to a particular inmate shall be available on request to the inmate.

c) Copies of all reports shall be retained.

BASIC RIGHTS AND FREEDOMS

VI. Mail

1 Inmates have the right to send and receive mail freely except as restricted herein and subject to any other legal restrictions on the use of the mails.

Postal Observer

2 The inmate committee may appoint an inmate, designated the postal observer, to observe the actions of the postal officer in receiving, opening, and distributing mail. The postal observer shall witness any opening of mail, and shall sign, as witness, a daily statement by the postal officer indicating all items of alleged contraband found in the mail, or that there was none, and that mail was not read or censored, if such is the case.

Privileged Correspondence

3 Correspondence to and from persons listed in Schedule A hereto is designated as privileged, and may not be opened or inspected by correctional authorities.

Outgoing Correspondence

4 Outgoing correspondence other than that covered by s.3 above may be sealed by the inmate and shall not be opened, but

a) Such correspondence may be submitted to inspection that does not involve opening the mail, and where such inspection reveals reasonable grounds to believe that the envelope or package contains an object which may constitute a threat to public safety or evidence of an offence, the institutional head may authorize the opening of the package or envelope for inspection, but not reading, of the contents.

b) A package or envelope may only be opened pursuant to paragraph a) above in the presence of the postal observer, and the inmate sending the mail must be advised in writing of the reasons that the mail was opened.

5 Inmates may correspond with whenever they wish, except that the institution may refuse to permit correspondence where the addressee, or the parent or guardian of an addressee who is a minor, requests that they receive no further correspondence from an inmate. The inmate must be notified in writing that the correspondence may not be sent, with reasons for the prohibition.

Incoming Correspondence

6 Incoming correspondence may be opened in the presence of the postal observer so that the contents of the envelope may be inspected for contraband, but the correspondence may not be read.

Publications

7 The institutional head may prohibit entry into the institution of any publication which

a) violates federal or provincial legislation governing publications;

b) portrays excessive violence and/or aggression and which is likely to incite inmates to violence; or

c) contains detailed information on the fabrication of weapons or the commission of criminal acts which would endanger the security of the institution or public safety, and

d) where publications are prohibited pursuant to paragraph a), b) or c) above, the inmate shall be given reasons in writing for the prohibition.

General

8 Inmates who are unable to read or write are entitled to the assistance of a staff member, volunteer, or another inmate for correspondence purposes.

9 Indigent inmates shall receive postage, stationary and envelopes for at least five general correspondence letters per week and as many privileged correspondence letters as requested.

Schedule A

1. Solicitor General of Canada
2. Deputy Solicitor General of Canada
3. Commissioner of Corrections
4. Chairman of the National Parole Board

5. Correctional Investigator
6. Inspector General
7. Governor General of Canada
8. Canadian Human Rights Commission
9. Commissioner of Official Languages
10. Information and Privacy Commissioners
11. Members of the House of Commons
12. Members of the Senate
13. Members of the Legislative Council for the Yukon and the Northwest Territories
14. Members of the Provincial Legislatures
15. Provincial Ombudsmen
16. Consular Officials
17. Judges and Magistrates of Canadian courts (including their Registrars)
18. Legal counsel, legal aid services or other agencies providing legal services to inmates

VII. VISITS

1 All inmates have the right to visit with whomever they choose, subject to reasonable time and place limitations and to the restrictions herein.

Refusal or Suspension of Right to Visit

2(a) The institutional head or designate may refuse or suspend a particular visit

- i) where there are reasonable grounds to believe that immediate and pressing security concerns demand it, and where restrictions on the manner in which the visit takes place would not be adequate to control the risk; or
- ii) Where during a public visit, either the inmate or the visitor behaves in a manner that exceeds the bounds of acceptable behaviour in a public place,

a) Where the visit is suspended or refused, reasons for such shall be documented and the inmate and visitor informed of such reasons.

b) The institutional head may order a complete suspension of all rights to visit in an institution only where the security of the institution is at significant risk and where there is no less drastic alternative. Any such order must be reviewed by the Deputy Commissioner of the Region after 5 days and by the Commissioner of Corrections after 14 days.

Security and Monitoring of Visits

3 The institutional head shall respect, protect and enhance the privacy of inmate visits to the greatest degree possible, however, he or she may authorize the visual supervision of the visiting area in an unobtrusive, non-

mechanical manner, and, in the case of a section of a visiting area which is inaccessible, he or she may authorize mechanical visual monitoring.

4 The institutional head shall protect the privacy of inmate-counsel interviews by

a) providing interviewing facilities which may be within sight but not within hearing of any person and

b) providing interview facilities which have no glass or metal barrier between inmate and counsel, except where counsel requests a barrier for his or her safety.

5 Interviews between inmate and legal counsel shall not be monitored or recorded with listening or video devices.

6 Subject to s.3, there shall be no interception by means of an electro-magnetic, acoustic, mechanical or other device of an inmate's visit, unless prior authorization from the institutional head has been obtained, on the basis that there is evidence of a threat to the security of the institution.

Open Visiting

7 Visits shall take place with no physical barrier to personal contact except where

a) it is necessary for the safety of the visitor, or

b) the visit would present a serious threat to the security of the institution, and, where less drastic means (such as non-intrusive search) will not meet the security concern.

8 Where visiting is restricted pursuant to section 7 (a) or (b), the reasons shall be fully documented and the inmate and visitor informed of those reasons and provided with an opportunity to respond.

VIII. INMATE ORGANIZATION, ASSOCIATION AND ASSEMBLY

General Rights

1 Inmates have the right to form and join organizations for any lawful purpose, to solicit membership without coercion, to associate, to assemble, to circulate petitions for signature and to peacefully distribute lawful materials subject to reasonable time, place and staff limitations and subject to the following restrictions.

2 All inmate organizations desiring to associate, to assemble, to use institutional facilities and to have access to available institutional

resources and materials, must provide the institutional head with a membership list and a written description of the purpose of their organization.

3 The institutional head may restrict organizations and assembly in the following ways:

a) Where an assembly is to take place, the institutional head may assign staff to observe the assembly, but he or she shall seek to accommodate the organization's request for the assignment of specific staff.

b) Where an assembly is to take place that would, in the opinion of the institutional head, pose a threat to the security of the institution or to the protection of the public, he or she may prohibit it.

Inmate Committees

4 Inmates in every institution are entitled to form inmate committees, which shall be governed by the above provisions, and which shall, to the greatest extent possible, be involved on a continuing basis in the decision-making processes of the institution as they concern the inmate population.

5 The institutional head may remove a member of the inmate committee only where:

a) that member's committee activities pose a substantial threat to the security of the institution or to the protection of the public; or

b) that member abuses his committee position to achieve ends which are patently inconsistent with institutional security.

6 Where an inmate committee member is removed, the institutional head shall inform the affected inmate of the reason for the decision, in writing, and the inmate-member shall have an opportunity to respond.

IX. RELIGION

1 All inmates have the freedom of conscience and religion and are entitled to express their spirituality and exercise their religion freely, restricted only by immediate and pressing security concerns of the institution.

2 Without limiting the foregoing, this freedom includes

a) the freedom to express religious beliefs through religious practice which may include expression orally, in writing, in dress, behaviour and religious possessions, and

b) the freedom to congregate together, in accordance with the provisions on inmate assembly and association.

3 Correctional authorities shall make available the necessities required for inmates to manifest their religious beliefs equitably, and to the degree possible, including, but not so as to limit the foregoing:

a) interfaith chaplain;
b) facilities, such as chapel for religious worship;
c) worship service;
d) pastoral counselling;
e) special diets as required by the inmate's religious tenets; and
f) special religious rites on holidays generally observed by their religion.

X. PROPOSALS REGARDING CONDITIONS OF CONFINEMENT

Physical Conditions

1 Every inmate shall have a healthful and safe environment in which to live. Every correctional institution shall comply with the health, safety, sanitation and fire codes applicable to public buildings and shall be inspected regularly by independent inspectors.

2 The correctional authority shall ensure a reasonable standard of care in the protection of inmates from assault by other inmates and by staff.

3 In particular, but not as to limit the generality of the foregoing:
3 all parts of the institution shall be properly maintained and kept clean at all times;

b) institutions shall be designed, structured and situated in such a manner that program to fulfil the needs of inmates are facilitated;

c) all rooms in the institution shall have adequate and healthful space, heating, lighting and ventilation;

d) every inmate shall be provided with clothing adequate for warmth and health, according to the requirements of the season and the nature of his or her activities, including use at work where this is needed;

e) clothing provided shall be clean and kept in proper condition;

f) every inmate shall be provided with three nutritional meals each day; water fit for drinking shall be available to every inmate whenever he or she needs it;

g) every inmate shall occupy a cell or room by himself or herself, but if it is necessary for inmates to temporarily share a cell, each inmate shall be supplied with a separate bed;

h) every inmate shall be provided with clean bedding, appropriate for the season;

i) every cell or other area occupied by inmates shall have a clean, functioning and private toilet and other facilities for the maintenance of personal cleanliness;

j) adequate bathing and shower facilities shall be provided; and

k) every inmate shall have the opportunity for at least one hour of daily recreation and physical exercise in the outdoors, when weather permits; otherwise, in indoor facilities.

Medical and Health Care

4(a) The standard of health care for inmates shall be the same as for the general population.

b) Every institution shall provide the services of qualified competent medical, psychiatric and dental officers. Although services shall normally be provided during reasonable hours, emergency services shall be available at any time.

c) No health services shall be administered by persons who are not professionally recognized as competent to provide those services. No person who is not professionally qualified shall make a decision regarding an inmate's need for health services.

d) Every institution shall have ready access to all of the services of an accredited hospital.

e) Every inmate shall have the right to prompt medical attention when so requested, taking into account the nature of the problem and the institution's reasonable procedures for providing daily medical services.

f) The reasons for any disability, injury or illness shall not have any bearing on the provision of quality medical attention.

g) An inmate may obtain the services of a qualified physician of his or her choice for the treatment of medical complaints where the inmate pays for costs incurred.

Medical Records

5(a) Complete and confidential medical records shall be maintained in respect of each inmate. Where an inmate is transferred to another institution, his or her medical records shall be promptly transferred to that institution.

b) Complete records shall be maintained of the administration of all drugs to inmates. These shall include the type and quantity of the drug administered, and the date, time and reasons for its administration.

Right to Refuse Medical Treatment

6(a) Compulsory treatment of inmates can only be administered pursuant to applicable provincial legislation.

b) The inmate may voluntarily consent to medical treatment, provided:
  i) the objectives of the treatment are clearly explained to the inmate-patient; and
  ii) any known risks and dangers are also explained.

Access to Legal Materials

7 All inmates shall have access to legal materials.

8 In particular, but not so as to limit the generality of the foregoing:

  a) every maximum and medium security institution shall have legal materials as specified in the regulations (see Schedule A), to which inmates have access;

  b) legal materials shall include adequate writing supplies and instruments;

  c) each institution shall have at least one person on staff or available who is properly qualified and authorized for the taking of oaths;

  d) inmates shall be entitled to acquire law books and other legal research materials from any source.

Schedule "A"

1 The most recent Revised Statutes of Canada and Regulations, with up-to-date annual volumes.

2 The most recent Revised Statutes and Regulations of the province in which the institution is located, with up-to-date annual volumes.

3 An up-to-date annotated *Criminal Code of Canada*, and related criminal statutes.

4 Criminal case reports: C.C.C.'s and C.R.'s

5 Recently available basic textbooks on criminal law and procedure, correctional law, constitutional law and administrative law.

6 Correctional Caselaw Manual.

7 The rules of procedure in the Federal Court of Canada.

8 The rules of procedure in the provincial courts in which the institution is located.

9 All Senate and/or House of Commons and/or Legislative Assembly reports on prison and/or parole; all relevant Royal Commissions, Commissions of Inquiry; and any government reports on corrections which are made public.

10 Canada Law List.

ENFORCING THE RULES

XI. JUDICIAL REMEDIES

Any person whose rights as set out in this Art have been infringed or denied may apply to the Federal Court of Canada, and the Court may award such remedy as it considers appropriate and just in the circumstances.

XII. PROPOSED INMATE GRIEVANCE PROCEDURE

Objective

1 There shall be an inmate grievance procedure established at each penitentiary whose purpose shall be to provide a fair and timely means to resolve grievances about matters falling within the responsibility of the Commissioner of Corrections.

Procedure

2 Once a grievance has been filed, there may be an attempt to resolve the matter informally, without reference to the grievance resolution committee. There shall be no requirement for such informal resolution, however, and attempts at informal resolution shall not in any way prejudice the grievant's right to be heard through the formal grievance resolution process.

3 The Commissioner shall establish, at each penitentiary under his or her jurisdiction, grievance resolution committees to hear and resolve grievances of persons within the penitentiary. Such grievance resolution committees shall consist of equal numbers of staff appointed by the institutional head and inmates elected by their peers, as well as a non-voting chairperson.

4 The Commissioner shall promulgate rules and regulations establishing procedures for the fair, simple and expeditious resolution of grievances, including but not limited to setting time limitations for the filing of complaints and replies thereto for each stage of the grievance resolution process.

5 A person aggrieved by the decision of a grievance resolution committee may apply to the Commissioner for review of the decision. The Commissioner or his or her delegate may take such action as he or she deem appropriate to resolve the grievance fairly and expeditiously to the satisfaction of all parties. If the resolution of the grievance by the Commissioner or his or her delegate is deemed unsatisfactory by any party to the grievance, that party shall have the option to refer the matter to an independent arbitrator. The decision of the independent arbitrator shall be binding unless it is established to the satisfaction of the Federal Court that such decision would be contrary to law, would represent a clear danger to any individual or group of individuals, or would require funds not available in the current budget. In the latter case, the Commissioner shall present to the Court a plan for the implementation of the decision in future fiscal years.

6 The Federal Court has jurisdiction to hear and determine an application to review and set aside a decision or order made by an independent arbitrator upon the ground that the arbitrator:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise his or tier jurisdiction;

b) erred in law in making his or her decision or order, whether or not the error appears on the face of the record; or

c) based his or her decision or order on an erroneous finding of fact which he or she made in a perverse or capricious manner or without regard for the material before him or her.

7 There shall be no reprisals for the use of the grievance procedure. Copies of grievances shall not be placed on files which form part of the case documentation for significant decisions made about the offender, such as transfer and release.

8 Replies to all grievances shall be made in writing and shall detail the reasons for the decision and the deadline for action to be taken on the grievance, if applicable.

9 Those elements of a grievance which could result in disciplinary action against a staff member shall be referred to the institutional head for proper action through the normal procedure for staff discipline. No findings or recommendations regarding staff discipline shall be made by a grievance resolution committee or an independent arbitrator, nor shall the outcome of any inmate grievance be used as a basis for staff discipline.

XIII. OFFICE OF THE CORRECTIONAL INVESTIGATOR

1 The Governor in Council may appoint a person to be known as the Correctional Investigator of Canada. The Correctional Investigator shall hold office during good behaviour for a term of five years, but may be suspended or removed for cause at any time by the Governor in Council.

2 The Correctional Investigator has the control and management of all matters connected with the Office of the Correctional Investigator, including the use of such officers and employees as are necessary to enable the Correctional Investigator to perform the function and duties of the Office.

3 It is the function of the Correctional Investigator to conduct investigations into the problems of inmates related to their confinement or supervision on temporary absence, day parole, parole or mandatory supervision. In performing this function, the Correctional Investigator may investigate any decision, recommendation, act or omission of the Commissioner of Corrections or any person under the control and management of, or performing services for or on behalf of, the Commissioner of Corrections that affects inmates either individually or as a group.

4 In the course of an investigation, the Correctional Investigator may hold any hearing and make such inquiries as the Correctional Investigator

considers fit, but no person is entitled as of right to be heard by the Correctional Investigator.

5 In the course of an investigation, the Correctional Investigator may require any person:

a) to furnish any information that, in the opinion of the Correctional Investigator, the person may be able to furnish in relation to the matter being investigated; and

b) to produce, for examination by the Correctional Investigator, any document, paper or thing that, in the opinion of the Correctional Investigator, relates to the matter being investigated and that may be in the possession or under the control of that person.

6 In the course of an investigation, the Correctional Investigator may summon and examine on oath

a) where the investigation is in relation to a complaint, the complainant, and

b) any person who, in the opinion of the Correctional Investigator, is able to give any information relating to the matter being investigated,

and for that purpose may administer an oath.

7 The Correctional Investigator may, on satisfying any security requirements applicable thereto, at any time enter any premises occupied by or under the control and management of the Commissioner of Corrections and inspect the premises and carry out therein any investigation or inspection.

8 When informing the Commissioner of Corrections of a problem, the Correctional Investigator may make any recommendations the Correctional Investigator considers appropriate.

9 The Commissioner of Corrections shall advise the Correctional Investigator within 45 days of receiving a recommendation what action will be taken with respect to the recommendation.

10 The Correctional Investigator shall, within three months after the end of each fiscal year, submit to the Solicitor General a report in both official languages of the activities of the Office of the Correctional Investigator during that year and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which the House is sitting after the Solicitor General receives it.

11 If within a reasonable time after the Correctional Investigator has informed the Solicitor General of a problem no action has been taken which seems to the Correctional Investigator to be adequate and appropriate, the Correctional Investigator may submit a special report to the Solicitor General about the problem and the Solicitor General shall cause every such report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

POWERS AND RESPONSIBILITIES OF CORRECTIONAL STAFF

Correctional Law Review

Working Paper No. 6

October 1987

EXECUTIVE SUMMARY

INTRODUCTION

Recognizes the central role of staff in the achievement of both short-term security goals (prevention of escapes and maintaining order and safety in institutions) and the long-term goal of the reintegration of offenders into society. The normal day-to-day operations of an institution proceed on a consensual basis, but in certain circumstances staff may require powers to enable them to meet security needs.

The introduction also recognizes the shared interest that staff and inmates have in a safe, secure environment and the close connection between staff powers and individual rights. It sets out the principles which should be relied upon in defining staff powers.

PART I

Examines the mandate of the correctional agency and the duties and responsibilities currently imposed on staff by law. It then reiterates the statement of purpose for corrections developed in the *Correctional Philosophy* Working Paper and seeks to determine the activities staff must perform in order to achieve this purpose. The paper focuses upon the tasks carried out by correctional/living unit officers, who have the most direct contact with inmates, and who are the staff primarily responsible for the security of institutions. This part emphasizes the complexity of the correctional officer role, and then goes on to discuss certain tasks which may require the use of a staff power or the use of force.

PART II

Examines the current rules authorizing staff powers, which include specific provisions on search and dissociation in the *Penitentiary Service Regulations*, and the more general provisions of the *Criminal Code* conferring peace officer powers on members of the correctional agency who are designated peace officers. Concerns about the general granting of peace officer powers in the penitentiary setting are raised. After considering the unique mandate of corrections, this part concludes that the current method of providing powers to staff through the granting of peace officer status should be reconsidered. It is in the interests of staff, inmates and the system as a whole that correctional legislation clearly provide necessary staff powers and any limits on them.

PART III

Discusses the use of force by correctional staff by examining the current rules relating to all public officials, and then exploring situations unique to the institutional setting - prevention of escapes, major disturbances, and enforcement of prison rules. Specific provisions regarding the use of force are recommended, both in regard to the circumstances which justify the use of force and how much force may be used. Post-incident reporting procedures are also proposed.

The related issue of protections for *bona fide* mistakes of correctional staff in their use of force and staff powers is also discussed in this part. It is concluded that the content of the present law is appropriate, but that for the sake of clarity, certainty and accessibility, the protections should be set out in correctional legislation.

PART IV

Examines accountability of staff, particularly in relation to the use of force and staff powers. It discusses current internal mechanisms such as administrative directives, Inspector General's Branch, Code of Conduct, and Inmate Grievance Procedure. External means of accountability include the Correctional Investigator's Office and the courts. The concept of a public Complaints Review Committee is explored and a proposal is made for the incorporation of parts of the model in an expanded mandate for the Correctional Investigator.

CONCLUSION

Reiterates the importance of correctional staff in carrying out the mandate of the correctional agency and working towards the overall purpose of corrections - that of contributing to the maintenance of a just, peaceful and safe society.

INTRODUCTION

The Correctional Law Review has as its purpose the review of current legislation governing corrections, and the development of new legislation which in form and substance reflects Canadian correctional philosophy and facilitates the attainment of correctional goals and objectives. Such legislation should be clear and unambiguous, give appropriate guidance to staff, and be perceived as fair and reasonable by all concerned. The interests of the public, correctional administrators and staff, and offenders must all be taken into account. In this paper, issues that arise in relation to the powers of staff working in the federal correctional system are addressed.

It is well recognized that correctional staff wish to work in an environment that is as safe as possible and to avoid unnecessary confrontations with inmates. Staff prefer that their routine, daily interaction with inmates be cooperative rather than filled with hostility and distrust. Indeed, both staff and inmates need and desire personal safety, a decent environment in which to live and work, reasonable and respectful treatment by others, and a less tension-filled atmosphere. These practical and personal concerns are thoroughly consistent with public protection, safety, security and control.

In this regard, it has been pointed out that the security, control and public protection provided by prisons cannot be achieved simply through the use of locks, walls, fences, bars, gates or electronic surveillance - these are only tools. The principal way in which security, control and public protection are provided is by correctional staff interacting in constructive ways with the people they supervise.[1]

In practice, institutions run essentially on a consensual basis most of the time - inmates know the rules and will generally abide by them. Inmates go peacefully and voluntarily to work, participate in educational or recreational programs and return voluntarily to their cells at night. Staff for the most part need only give general or specific direction to inmates to ensure that rules are obeyed. However situations do occur where staff may require exceptional powers in order to meet the security needs of the institution - force may be required to prevent assaults on other inmates or staff; staff may need to search for weapons or drugs; a violent inmate may need to be dissociated from the rest of the prison population; or force may be necessary to prevent an escape from the institution.

At the same time, the long-term goal of the re-integration of offenders into society must not be forgotten. As discussed in previous Working Papers, in order to achieve this goal, offenders should be treated in a humane and fair way which recognizes their rights and freedoms while still permitting correctional authorities to maintain security and control. If the correctional system hopes to engender in offenders a respect for other people and property in Canadian society, it should strive to achieve an environment that operates through clear rules, structured decision-making, and fair treatment. Particularly important is the role played by staff in applying the rules and in their general demeanour towards inmates.

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[1] Discussed in Gilbert, M.J. and Riddell, A. "Skills for Achieving Security, Control and Public Protection," in *Correctional Officers: Power, Pressure and Responsibility*, American Correctional Association, 1983, p. 33, and in *Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions*, November 1984, (Carson Committee Report).

This paper will discuss the role of staff in the federal correctional system by first looking at the overall mandate of the correctional agency and then turning to the actual activities performed by staff in order to achieve that mandate. The discussion centres mainly on the role of the correctional/living unit officer, due to the importance of that position in maintaining the security of the institution, providing basic services to inmates and having the most direct contact with them. Next the paper discusses the nature of staff powers and the central issue of whether correctional staff need peace officer status, or whether specific powers and protections should be set out in correctional legislation. For the purposes of this paper, the word "power" is being used not in a broad sense but in the more narrow legal sense of a specially created exception to the normal law applying to individuals. This exception enables an official such as a staff member to do something, such as search a person, that an individual is normally forbidden to do by the civil or criminal law. Because powers allow officials to do what is usually prohibited, they conflict with important individual rights ordinarily protected by law such as the right to security of the person, privacy, and so on, and should therefore be carefully scrutinized.

The question of the appropriateness of staff powers in this context implies two things: that the powers granted to staff are sufficient and necessary to the performance of their duties (and thus the achievement of their mandate), and that the powers are consistent with the principles underlying our criminal justice system. These principles are expressed in the *Charter*, in The *Criminal Law in Canada Society* (*CLICS*) and in our proposed statement of purpose and principles for corrections.

The underlying theme of restraint in the *CLICS* document is of particular relevance to staff powers. The doctrine of restraint in the use of the criminal law and in the criminal justice system implies that an offender should be incarcerated in the least restrictive environment possible, and that state intervention, such as in regard to staff powers, should only be authorized to the degree necessary. In addition, *CLICS* recognizes the need to explicitly and clearly define necessary peace officer powers in law.

Our statement of purpose and principles of corrections is also relevant. One aspect of the statement of purpose - providing the degree of custody or control necessary to contain the risk presented by the offender - recognizes the short-term security concerns in the correctional setting and the need to prevent escapes, control contraband and ensure the safety of staff and inmates. These elements of the purpose may, in certain instances, require the use of staff powers. Other aspects of the purpose of corrections discussed above, - namely, encouraging offenders to prepare for eventual release and successful re-integration into society, and providing a safe and healthful environment to offenders which is conducive to this goal - recognize the long-term goals of the system, and that society's long-term interests would be best protected if the correctional system has the effect of influencing offenders to begin or resume law-abiding lives. Staff have a critical role to play in this regard, and in regard to the attainment of the correctional system's overall purpose and objectives. To this end, and as suggested above, clear rules, structured decision-making and an atmosphere of fairness and openness will all be important.

Our discussion of staff powers takes place in the context of other projects examining various aspects of powers of peace officers and other officials. The Police Powers Project of the Criminal Law Review is particularly concerned with the question of the attachment of the full range of police powers to peace officers, whereby anyone so designated (such as a correctional staff member) is given all of the powers of a peace officer. An ancillary concern of that project is the propriety of police officers having powers outside the realm of criminal law enforcement, for instance, in regard to regulatory matters.

Another project, called Federal Law Enforcement Under Review (FLEUR), has been examining the federal law enforcement system to develop proposals to ensure that enforcement agents of the federal government possess powers appropriate to the effective discharge of their law enforcement responsibilities. It should be noted that correctional staff were not included in that review as they did not fit within the project's definition of law enforcement activity:

> activity which goes beyond routine monitoring and inspection or the application of administrative sanctions, to include a range of police-like functions such as patrol, traffic law enforcement and the investigation of suspected offences which could lead to criminal prosecution under the *Criminal Code* or other federal statute.

In addition, studies and reports of the Law Reform Commission of Canada have criticized the remarkable proliferation of powers granted under federal statutes and have stressed the need for review of federal legislation. It is important to note that correctional staff powers are examined in certain respects in Working Paper No. 5 of the Correctional Law Review, entitled *Correctional Authority and Inmate Rights*. Because powers such as search and seizure conflict with important individual rights of inmates such as the right to security of the person, privacy, the right to be secure against unreasonable search or seizure, and so on, they are dealt with in the discussion of inmate rights. In association with the work in the present paper, specific procedures to govern areas such as search and dissociation of inmates were developed in Working Paper No. 5 to provide guidance to staff. The proposals were formulated as statutory provisions in order to generate discussion about what legislative provisions might look like, what degree of specificity is appropriate and what impact the proposals might have on operations. Developing these procedures involved the careful balancing of individual rights of the inmate with legitimate security concerns of the institution, such as controlling contraband, preventing escapes, and maintaining order. The procedures are designed to provide staff with the powers necessary to carry out their duties, while restricting rights to the minimum extent necessary.

In defining staff powers we were guided by the following principles, which are consistent with principles developed by the FLEUR Project, as well as with *CLICS* and our own proposed statement of correctional philosophy:

1 Staff powers should be granted by law and should be clearly defined.

2 The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.

3 In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.

4 To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.

5 Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The Working Paper on *Correctional Authority and Inmate Rights* sets out specific procedures, based on these principles, to govern use of staff powers in certain situations. The present paper goes beyond specific procedures by examining general, yet critical, questions which relate to correctional staff powers. One important question concerns the general granting of powers. Another area of concern is the use of force: under what circumstances can force be used in exercising staff powers, and how much or what degree of force can be used? A further question to be considered is the degree to which the law should provide protection to staff in the exercise of their powers. Finally, the paper will discuss accountability mechanisms to ensure that safeguards and means of review are available in cases where abuse of staff powers is alleged.

PART I: THE MANDATE OF THE CORRECTIONAL AGENCY

Although the mandate of the Correctional Service of Canada is not specified in statute, certain duties and responsibilities of staff are specified in the *Penitentiary Service Regulations*. Section 3 stipulates the duty of each member of the Service:

> It is the duty of every member to give effect, to the best of his ability, to the laws relating to the administration of penitentiaries in Canada and to use his best endeavours to achieve the purposes and objectives of the Service, namely, the custody, control, correctional training and rehabilitation of persons who are sentenced or committed to penitentiary.

Section 5(1) sets out the responsibilities of the institutional head:

> The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Furthermore, s.37 stipulates that "it is the duty of the institutional head to take all reasonable steps to ensure the safe custody of inmates committed to his care."

The *Report on the Statement of CSC Values*[2], released in November of 1984, proposed the following as a mission statement for the Correctional Service of Canada:

> The Correctional Service of Canada, as part of the criminal justice system, contributes to the protection of society by exercising safe, secure and humane control of offenders while helping them become law-abiding citizens.

This mission statement and the guiding principles also proposed in the Report are reflected in CSC policy and are incorporated in the revised Commissioner's Directives.

The importance of a comprehensive statement of purpose for Canadian corrections was discussed in two Correctional Law Review Working Papers, *Correctional Philosophy* and *A Framework for the Correctional Law Review*. Our proposed statement of purpose is as follows:

> The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:
>
> a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

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[2] 0. Ingstrup (Chair.) 1984. *The Report of the Task Force on Mission and Organizational Development*: "The Statement of CSC Values".

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society.

Given this statement of purpose, we now need to determine the activities which must be carried out by staff in order to fulfill the overall goal of contributing to the maintenance of a just, peaceful and safe society.

As in any community, there are numerous and diverse activities carried out every day in Canadian penal institutions, such as providing meals to inmates, supervising recreation, locking cells and administering psychological tests. There are a variety of staff performing these activities - the correctional officer who plays a central role in the security of the institution, treatment staff, recreation officers, food services staff, classification staff, health care officers, work supervisors, social development staff, and several levels of management staff. In the community are parole officers who supervise offenders on conditional release, do community investigations and perform community development and public education functions.

Because correctional/living unit officers have the most direct contact with inmates and are the staff primarily responsible for the security of institutions, an examination of the variety of tasks carried out by them is undertaken below.

The current job descriptions for a correctional officer, maximum security institution (CX-COF-2), and a living unit officer (CX-LUF-1), who performs many of the security functions at most minimum and medium security institutions, are reproduced in *Appendix B*. The duties of a correctional officer are aimed at ensuring the security of the institution by maintaining surveillance over inmates by observing the activities of inmates from a security post or by periodic rounds of cells, by counting inmates at specific times and places, and by searching inmates for possession of contraband such as knives, firearms and drugs. Secondly, the correctional officer controls the movement of inmates and others by locking and unlocking doors, by counting and escorting inmates, inspecting inmate passes, screening and searching all vehicles and drivers entering prison premises and identifying and registering visitors. Another duty is to ensure the cleanliness and security of the assigned post by inspecting the area for cleanliness and repairs, supervising the cleaning of cells and kitchens, examining furniture, personal effects, windows and locks for evidence of contraband, destruction, or attempts to escape, checking for potential fire and safety hazards, ensuring that emergency equipment such as fire sirens, firearms and gas equipment are in good working condition, and by controlling the issue and return of firearms. Other duties include such activities as supervising bathing, dressing, and meals of inmates in segregation, admission and pre-release areas.

In living unit institutions, correctional officers are responsible for perimeter security, and central controls, and staff the institution at night, but have little contact with inmates. Living unit officers serve a control and supervision function by searching inmates, cells and rooms, counting inmates, regulating individual and group movement, gathering and reporting information, and supervising inmate activities such as recreation.

The living unit officer role has an additional component - that of providing casework services to inmates. The living unit officer is required to establish effective interpersonal relationships to promote reconciliation, act as referral agent for all requests, obtain detailed knowledge of inmates, participate in the analysis, planning and evaluation of individual cases, counsel inmates, and escort inmates in the community in preparation for release. Thus the living unit officer role combines two sets of goals - that of providing for the immediate security of the institution and all persons within it, and the long-term goal of the re-integration of inmates.

There is inherent conflict in living unit officers assuming a "treatment" role as well as a "custody" role. On the one hand, the living unit officer has come to be seen as a central and critical influence on the inmate by providing an example of effective leadership, and positive attitude, and by working as a personal counsellor. On the other hand, the living unit officer is seen as the "heavy", the individual who enforces the rules of the institution, conducts searches, and who may be called upon to use force to maintain order. This inherent conflict in the living unit officer role reflects the complexity of corrections as a whole (an area which was addressed in the first two Working Papers). The Working Group believes that the complexity of corrections will always present some difficulties for staff, but that these difficulties can be diminished by a clear statement of correctional philosophy in legislation, clearly established role definitions and clear rules to structure discretion in decision-making processes.

Any discussion of staff roles must also be informed by the realities of prison life. Correctional officers are daily faced with a dangerous and frustrating job. The very nature of a penitentiary leads to tensions not usually found in the outside community. Large numbers of people, many of whom may be prone to violence or anger, are locked up in close quarters hour after hour with inadequate diversion and limited privacy. In prison problems such as personal enmities, grudges and theft of property become magnified because of the closed nature of the institution. Correctional officers are often on the receiving end of inmates' frustrations and must be able to respond appropriately to all sorts of potentially dangerous situations.

For the purposes of our discussion, activities carried out by correctional staff can be divided into two general categories: a) providing for the security of the institution (including the safe custody of inmates); and b) the provision of services and programs to inmates. The provision of services and programs proceeds on a cooperative basis and does not require the use of force or exceptional powers for the effective delivery of the services. For example, inmates receive medical treatment, go out on temporary absence and participate in educational or recreational programs on a voluntary basis.

On the other hand, many of the security functions routinely performed by correctional and living unit officers may require the use of force or a staff power for their effective performance. These include such tasks as responding to unusual behaviour patterns, controlling inmate movement, protecting other staff, visitors and inmates, controlling visitors, maintaining internal security checkpoints, escorting inmates within the institution and in the community, initiating dissociation procedures, and using appropriate restraint equipment. All of these tasks could require the use of force under certain circumstances, although in the vast majority of situations, this will not be necessary. Nonetheless, staff must have the authority to use force in those unusual situations where an inmate's behaviour threatens the order of the institution or the safe custody of other inmates.

This section has reviewed the mandate of the correctional agency and highlighted many of the tasks which staff are called upon to perform in fulfillment of this mandate. Because of their central role in carrying out the security goals of the institution, we discussed the many-faceted duties of correctional/living unit officers, including listing a series of tasks for which exceptional powers may be needed. We will now review the current rules authorizing staff powers and highlight some of the problems which exist with the present scheme.

PART II: AUTHORIZATION OF STAFF POWERS

At present, correctional staff powers are derived from two sources - the *Penitentiary Act* and *Regulations*, and the *Criminal Code*. The *Penitentiary Act* and *Regulations* provide a degree of direction in certain areas; for example, there is authority to search and to dissociate inmates. These provisions are reproduced in *Appendix C*. (These areas, together with a number of other significant areas, are discussed in detail in Working Paper No. 5 on *Correctional Authority and Inmate Rights*).

At the same time, designated penitentiary staff acquire an array of exceptional powers by virtue of their inclusion as peace officers in Section 2 of the *Criminal Code*:

> "peace officer" includes a member of the Correctional Service of Canada who is designated as a peace officer pursuant to the *Penitentiary Act*, and a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in the *Penitentiary Act*.

Section 10 of the *Penitentiary Act* further provides that:

> The Commissioner may in writing designate any member or class of members of the Service to be a peace officer and a member so designated has all the powers, authority, protection and privileges that a peace officer has by law.

These provisions (recently amended by an Act to amend the *Parole Act*, *Penitentiary Act*, *Prisons & Reformatories Act* and the *Criminal Code*, S.C. 1986, c. 43) now permit correctional management to specify which correctional staff will have peace officer status. Currently the classes of members proposed for peace officer status are all employees in institutional settings, all operational officers in parole offices, Regional Deputy Commissioners and certain Headquarters staff.

However, the recent amendment does not address the basic issue surrounding peace officer status - is the general granting of an array of exceptional powers appropriate for correctional staff, who have a unique mandate, or should necessary powers be specified in correctional legislation?

There are over 75 *Criminal Code* provisions, summarized in *Appendix D*[3], which specify peace officer powers and protections and which automatically attach to peace officers. These powers were developed to facilitate enforcement of the criminal law in the community. They consist of powers to search and seize, wire-tap, arrest, and so on, all of which are necessary in order to investigate and prosecute criminal offences.[3]

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[3] The Police Powers Project has outlined the sections of the *Criminal Code* which detail peace officer powers and protections in *Definition of Police Officer/Peace Officer*, October, 1984. (See *Appendix D*)

Different considerations apply in a correctional setting, where activities are geared towards preventing escapes, curbing violence and maintaining order in the penitentiary. What is necessary to the fulfillment of security goals in an institution will not necessarily coincide with peace officer powers found in the *Criminal Code*. Not only does the general granting of peace officer powers geared towards the role of the police result in corrections staff receiving powers that they do not need in carrying out their duties, but more importantly, it also means that in certain instances powers that they do need are not adequately authorized.

For example, the powers of arrest and release have very little application in the correctional context. Offenders are already being detained in a secure environment so there is no need for a further power to detain. If criminal charges are alleged, the service of process on the accused inmate would be sufficient. Since CSC policy on criminal offences[4] is to have local enforcement agencies investigate and lay charges for serious offences, while minor offences are dealt with through the internal disciplinary process, there appears to be little need for this police power.

On the other hand, correctional staff do need the power to remove inmates to dissociation cells in certain circum stances, and reasonable use of force would be justified if necessary to carry out such authorized conduct. The appropriate authority does not flow from peace officer status, however, and must be specifically provided for in correctional legislation.

Another situation which must be considered is the arrest of visitors or staff suspected of committing an offence. Even without peace officer status, correctional officers could make arrests as ordinary citizens, where they find someone committing an indictable offence (s.449(1) *Criminal Code*). An ordinary citizen must, however, deliver the accused to a peace officer forthwith (s. 449(3)).

In practice, however, correctional staff do not engage in such law enforcement activities. Where correctional staff believe a visitor or other staff member has committed an offence, the local police will be summoned, who will then consider whether to lay charges or arrest the suspect. This distinction between the role of the correctional staff member and that of police officer is appropriate and should be maintained.

One situation where correctional officers might wish to arrest is where an escaped inmate is discovered in the community. However, the criminal offence of being unlawfully at large (s.133) is an indictable offence and a continuing one, for which any person may arrest without warrant if he or she finds someone committing the offence. Peace officer status is thus not necessary for correctional staff to arrest an escaped or escaping inmate.

Peace officer status (or other statutory authorization) is necessary to effect an arrest with a warrant. The one situation where correctional personnel may need a similar power to apprehend is where a parole officer suspends parole and wishes to apprehend the offender. However the suggestion that parole officers execute their own suspension warrants has been met with strong opposition within the Correctional Service since 1977 when the Parole and Penitentiary Services were integrated. Parole officers have always maintained that peace officer powers are incompatible with their most important role of assisting in the rehabilitation of the offender, and indeed this is not currently part of their function. There does not appear to be any pressing need to have parole officers execute their own suspension warrants, and this task may be more appropriately done by an agency charged with general law enforcement duties in the community.

The breathalyzer provisions in the *Criminal Code* (s.234-237), whereby a peace officer may require a driver to provide a breath sample, also seem inappropriate to the role of correctional staff. With the relatively infrequent exception of inmates driving farm or other institutional vehicles on penitentiary property, the only driving an offender is likely to do would be either on an unescorted temporary absence or parole and the enforcement of the criminal law in the community is already carried out by the local police force.

On the other hand, in certain circumstances corrections staff do need powers such as the power to demand a urine sample, which does not flow from peace officer status and the powers specified in the *Criminal Code*. This power must be specifically granted in correctional legislation.

Corrections staff need the power to search inmates and their cells on a controlled but regular basis. Yet the present search authorizations in the *Criminal Code* and the *Penitentiary Service Regulations* are inadequate in a number of ways. The provisions in the *Criminal Code* are directed at police investigations and are governed by the criminal law standard that requires reasonable grounds to believe an offence has been committed. In the corrections context, by contrast, necessary search powers are often more in the nature of an inspection or on-going monitoring of inmates in order to deter as well as detect illegal conduct. The criminal law standard would not enable such searches to be carried out because they are not related to the commission of a criminal offence. The *Penitentiary Service Regulations* provide in s.41(2) for a search power "where a member considers such action reasonable to detect the presence of contraband or to maintain the good order of an institution." As discussed in the Working Paper on *Correctional Authority and Inmate Rights*, this test is vague, ambiguous, does not provide sufficient guidance to staff, and may not be consistent with the *Charter*. More detailed provisions were therefore proposed in that paper.

Recognizing the difference between the duties of the police and of corrections staff points to the need for different powers to be clearly and adequately authorized for corrections staff. In summary, after considering the unique mandate of the correctional agency, we conclude that the current method of providing powers to correctional staff through the granting of peace officer status should be reconsidered for a number of reasons.

First, in certain circumstances the powers that a corrections staff member may need to carry out his or her duties are either not authorized or not sufficiently set out in law. The general granting of law enforcement powers and the lack of comprehensive provisions in corrections legislation result in confusion as to whether a power is available, or how much force staff members may use in certain situations without opening themselves up to civil or criminal liability.

Second, the automatic conferral of expansive law enforcement powers upon corrections staff means that staff are provided with a wide range of powers that are inappropriate in a correctional setting, where their role is markedly different from that of a police officer in the wider community. This tends to lead to confusion on the part of staff as to their real duties and real role.

Finally, any psychological comfort which a staff member may lose with removal of peace officer status and the general granting of powers must be weighed against the advantage brought to correctional staff by having the powers that they need authorized, and the limit and extent of their powers clearly set out in law and easily accessible and understandable to them. The extent of staff powers is a matter which has serious consequences for staff members and the present problems in the law are not conducive to either a fair or effective correctional system. It is in the interests of staff, inmates and the system as a whole that correctional legislation clearly provide necessary staff powers and any limits on them. By doing so, the important, unique and difficult role of staff members is recognized and clarified.

PART III: THE USE OF FORCE AND PROTECTIONS FOR STAFF

As was discussed above, institutional operations and processes generally proceed on a consensual basis - inmates know the basic rules set down for their activities, and usually obey them. However, where exceptional powers must be used - for example, to search inmates suspected of possessing contraband, or to dissociate an inmate for disruptive behaviour - questions arise both in regard to the circumstances which justify the use of force and how much force may be used. In this section we seek to develop legal guidelines for the use of force, including deadly force, within a correctional institution.

Although the use of force by one individual against another is generally prohibited by both criminal law (assault, murder, etc.) and civil law (trespass to the person, assault, battery), its use is authorized for certain officials in carrying out their duties. This authorization in turn provides protection to officials should unlawful conduct be alleged. The persons subject to the use of force are also protected by the limits and procedures provided to define when and how it is permissible for force to be applied.

The central issues for corrections are to determine the circumstances under which the use of force should be authorized, the degree of force which is appropriate in different circumstances, and the extent to which staff should be protected from sanctions for making *bona fide* mistakes in the use of force. In addressing these issues it is necessary to examine the present standards governing use of force set out in the *Criminal Code*, and to consider whether these standards are appropriate in the corrections context or whether there is a need for applicable provisions in correctional legislation. The present authorizations for the use of force and the protections given to officials are found in the *Criminal Code* and are reproduced in *Appendix D*. Section 25(l) sets out the general rule:

> 25(l) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
> (b) as a peace officer or public officer,
> (c) in aid of a peace officer or public officer, or,
> (d) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This section applies to every person (private person, public officer or peace officer) who is required or authorized by law to do something in the administration or enforcement of the law. Thus, correctional staff are included not because of their peace officer status, but by virtue of their office. Staff members relying on this section must act on reasonable and probable grounds (an objective test), and if they do, are justified in using *necessary* force in exercising their powers. Excessive force is punished by the ordinary rules of criminal liability:

> 26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

The courts looked at the purpose of s.25(l) in the case of *Eccles v. Bourque*:

> ... Whenever the *Code* confers a power to do a specific thing, s.25 does not confer a power to do any and everything that may assist or advance the exercise of the power. The purpose of s.25(l) is twofold: it absolves of blame anyone who [5]does something that he is required or authorized by law to do, and it empowers such person to use as much force as is necessary for the purpose of doing it.[5]

The interpretation of the phrase "required or authorized by law" in s.25 was considered in the case of *R. v. Berrie*.[6] In that case, line correctional officers were charged with assault after they had grabbed, handcuffed and forcibly shaved an inmate upon his refusal to obey their lawful order to shave. The accused officers relied upon s.25(l) of the *Criminal Code*, and argued that they used necessary force to carry out the administration and enforcement of the *Penitentiary Act*, its *Regulations*, orders and directives. The court rejected this argument and noted that the accused guards were neither required nor authorized by law to shave the inmate, although the inmate was required to obey their lawful order. Since he would not, their only recourse was to charge him with a disciplinary offence under the *Regulations*. Although the use of force was not reasonable in forcing the inmate to shave, reasonable force could have been used to dissociate the inmate to await a disciplinary hearing.

With respect to the circumstances under which force can be used, the *Criminal Code* provisions embody the principle of necessity - that force may only be used where authorized and where no alternative means are available. There exist in our correctional system a number of incentives or sanctions for failure to comply with institutional regulations - loss of or failure to earn remission, loss of privileges, imposition of fines. Thus, for example, if inmates refuse to leave their cells one morning, staff members would have a number of alternative ways to deal with the situation, but forcibly removing inmates from their cells would not be one of them, because less intrusive means exist to deal with this situation.

Three justifications for the use of force are generally recognized: self-defence, defence of property and the advancement of justice. Although we are mainly concerned with the third justification, self-defence and defence of property will also apply in the prison context.

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[5] (1974), 19 C.C.C. (2d) 129, (S.C.C.).

SELF-DEFENCE

The general rule on self-defence is contained in s.37 of the *Criminal Code* and states that unlawful force can be repelled by force which is necessary and proportionate in the circum- stances. The rule includes not only defending oneself from assault but also "any one under his protection." Deadly force is also justified where the victim has a reasonable apprehension of death or serious injury and there are reason- able and probable grounds to believe there is no other way to preserve oneself. Whether the force used in self-defence is excessive, and therefore unlawful, is a question of fact, and the courts will take into account all the circumstances. However, as has been noted in a number of cases, "a defending person cannot be expected to weigh to a nicety the exact measure of necessary defensive action."[7]

DEFENCE OF PROPERTY

The justification of defence of property is governed by ss.38-42 of the *Criminal Code*. Essentially it allows persons in peaceable possession of moveable property or real property to defend it against trespassers, as long as they use no more force than necessary. In the case of moveable property the possessor may not cause bodily harm to the trespasser. The Law Reform Commission recommends a simplification of the wording of the provisions and a restriction in all cases prohibiting the use of force likely to cause bodily harm.[8] Although these general provisions could be applied to inmates with respect to their personal possessions, authority to use force to prevent destruction of government property must be justified as being necessary for the advancement of justice, as discussed below.

ADVANCEMENT OF JUSTICE

The use of force for law enforcement is justified by the fact that the official is promoting a value explicitly recognized by law - by performing the duty imposed on him or her by law. As the Law Reform Commission notes, "the main problem in this context, then, concerns the drawing of the appropriate line between justifiable and unjustifiable use of force."[9] It states that the present law is more complex than it needs to be and is contained in an undue number of sections. It recommends a general section on law enforcement which incorporates the objective standard of reasonableness and the principle of necessity. It also recommends a specific provision for the use of force in preventing escape from prison:

> 16(1) Subject to the provisions of this section, every one required or authorized by law to do anything in the administration or enforcement of the law is, if acting on reasonable grounds, justified

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[8] Law Reform Commission of Canada, Criminal Law, *The General Part - Liability and Defences* (1982).

[9] *Ibid*, at 111.

in doing it and in using no more force than necessary for that purpose.

(1) Without restricting the generality of subsection (1), everyone is justified in a) effecting lawful arrest, b) preventing offences endangering life, bodily integrity, property or state security, and c) using no more force than necessary for these purposes.

(2) Every one required or authorized by law to execute a process or carry out a sentence is, if acting in good faith, justified under this section despite defect or lack of jurisdiction concerning such process or sentence.

(3) No one is justified by this section in using force which he knows is likely to cause serious bodily harm except when necessary

a) to protect himself or those under his protection from death or bodily harm,

b) to prevent the commission of an offence likely to cause immediate and serious injury,

c) to overcome resistance to arrest, or to prevent escape by flight from arrest, for an offence endangering life, bodily integrity or state security, or

d) to prevent the escape of, or to recapture, a person believed to be lawfully detained or imprisoned for an offence endangering life, bodily integrity or state security.[10]

The *Criminal Code* authorizes only the minimum force necessary to achieve the given purpose. Generally, the criminal law requires that the force used be proportional to the harm to be avoided. In the correctional context this might well be illustrated by inmates who cause extensive property damage in their cells - the use of deadly force would clearly be a disproportionate response to this behaviour.

One final element to be considered in the use of force is the immediacy of the threat - for example, a hostage-taking incident poses a very grave threat of harm to the hostages, but an initial response of deadly force may not be justified, when a lesser measure such as negotiation or the use of gas may prevent further harm.

Therefore in determining the appropriate provisions for the use of force in the correctional context we will be guided by the principles of necessity, restraint, proportionality and immediacy of the threat.

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[10] Law Reform Commission of Canada, Criminal Law, *The General Part - Liability and Defences* (1982), p. 113-114.

In accordance with these principles, and in line with the goal of providing guidance to staff in carrying out their duties, clear provisions regarding the use of force should be set out in legislation. This would include definitions of deadly and non-deadly force and the circumstances under which each could be used. The purposes for which force may be used should be set out, and these purposes should relate to the security and order of the institution (or community). Staff should only be authorized to use the minimum force necessary to achieve their objectives. Controls such as prior authorization (for example, by the institutional head prior to the use of gas, or the use of deadly force in a hostage-taking incident), and full reporting after the use of force, are also required. Our 5th principle deals directly with physical force:

> Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The following rule is proposed as a general rule to govern the use of force in the correctional system:

> All correctional staff who are required or authorized by law to do anything in the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

This general rule must be read in conjunction with other, more specific provisions regarding use of force in corrections. Special consideration must be given to three situations which do not normally occur in the community - prevention of escapes, regaining control of an institution after a major disturbance, and enforcement of prison rules.

A) PREVENTION OF ESCAPES

One of the clearest and most important duties of corrections staff is to prevent escapes. However, the justification for use of deadly force to prevent escapes raises complex questions.[11] Most case law dealing with the degree of force that is justified in preventing escapes from custody is based on principles developed in cases of escape from a police officer immediately following an arrest. Yet there is a difference between flight from arrest and flight from institutional custody that points to the need for different rules. In a flight from arrest, the arresting officer generally knows the crime for which the arrest is being made and can act accordingly. The corrections staff member may or may not know the dangerousness of the particular person whose escape is being prevented - indeed the identity of the person fleeing the institution may not be known. The doctrine of restraint means that the law ought not to authorize deadly force to prevent the escape of an individual whose offence and case history do not give an indication of violence or dangerousness. On the other hand, corrections staff cannot be expected to make instant identifications prior to taking preventive action.

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[11] Discussed in more detail in "The Legal Status of Prisoners: Standard with Commentary" in *The American Criminal Law Review*, Vol. 14, No. 3, Winter 1977.

The nature of the institution from which the offender is escaping is of some assistance here. According to the scheme used for classification of inmates, those considered likely to escape and to be dangerous if they do so are placed in the highest security levels. It would, therefore, be reasonable to have a presumption that an inmate escaping from a high level security institution is dangerous; however, if the staff member knows that the particular person escaping is someone other than a dangerous inmate, deadly force would not be justified. On the other hand, in a medium or minimum security institution the presumption would operate the other way and deadly force would not be justified unless the staff member believes on reasonable grounds that the person escaping is dangerous.

It is important to also keep in mind the other condition: that there are reasonable grounds to believe that no less intrusive measure would be effective. Situations where deadly force is used to prevent an escape would be extremely limited, even where the escape is from a maximum security institution. If a staff member in one of the perimeter towers observes an inmate climbing over a wall or fence, there will usually be enough time to radio the perimeter vehicle or officers with guard dogs, and catch the inmate before he leaves institutional property. Non-deadly devices such as stun guns and chemical agents should be considered as alternatives to the use of firearms to assist in the prevention of escapes.

American models suggest that deadly force is justified to prevent escapes from institutions primarily used for the custody of persons convicted of felonies, or where it is necessary to prevent the commission of a felony, including escape.[12] However in at least one case[13] the U.S. Court of Appeals declared a statute authorizing deadly force against fleeing felons to be unconstitutional as applied to non- violent fleeing felons.

In conclusion, the doctrine of restraint implies that in Canada, deadly force should only be authorized to prevent escapes from high-level security institutions, and only if the officer believes on reasonable grounds that no less intrusive measure will prevent the escape.

B) MAJOR DISTURBANCES

With respect to major disturbances, provision should be made for reasonable negotiation attempts and the use of non-deadly force prior to the use of deadly force, in accordance with the doctrine of restraint. At the same time, correctional staff clearly need authority to deal swiftly and appropriately with dangerous or volatile situations.

Although there are provisions in the *Criminal Code* governing unlawful assemblies and riots, again these are not entirely appropriate in the correctional setting. For example, commanding a group of inmates in the name of Her Majesty to disperse, and giving them

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[12] American Correctional Association, *Model Correctional Rules and Regulations*, 1979.

[13] *Mattis v. Schnarr* (1976), 547 F. (2d) 1007.

30 minutes to do so is clearly not appropriate in the closed confines of an institution. Staff require authority to take immediate action to ensure the security of the institution.

At the same time, it would be desirable to ensure that prior authorization from a superior officer is received before using force likely to cause bodily harm. Authorization from the institutional head, and where possible the Deputy Commissioner of the region, before deadly force is used is consistent with a desire to ensure that such important decisions are taken in as considered a fashion as may be possible, given the constraints of a dangerous and possibly life threatening situation. Provisions specific to major disturbances would of course operate in conjunction with provisions authorizing force, including deadly force, in self-defence or to prevent harm to or the death of others.

C) ENFORCEMENT OF PRISON RULES

Maintaining discipline within an institution may in certain situations require the use of force. However, it is important to recognize the difference between use of force to force an inmate to obey an order and use of force to dissociate an inmate who refuses to discontinue unlawful conduct. It is in the latter situation that force may be justified, subject to authorization in law to dissociate. Dealing in this way with an inmate found violating a rule or refusing to obey a lawful order is similar to arresting a person believed to have committed an offence or who refuses to discontinue unlawful conduct.

As a general rule, physical force should not be used to require obedience to a rule or regulation of an institution. As previously noted, in *R. v. Berrie*[14] correctional officers were convicted of assault when they grabbed and handcuffed an inmate and attempted to shave him against his will when he refused to obey their order to shave. The court held that the officers were not required or authorized by law to shave him although the inmate was under a duty to obey. The proper course would have been to charge the inmate with a disciplinary offence. The use of force in these circumstances was unreasonable to enforce a regulation of the institution.

On the other hand, corrections staff members are authorized by law to exercise certain powers, and they are justified in using reasonable force where necessary to exercise their powers. Thus any powers that may require the use of force should be specified in law. This approach provides guidance to staff and at the same time is consistent with s.1 of the *Charter* which states that limitations on fundamental rights (such as security of the person) must be "prescribed by law." Use of force where no alternatives exist should be authorized in legislation. For other institutional rules, compliance should be sought through incentives and disincentives such as inmate pay, remission, warnings, loss of privileges, or resort to the inmate disciplinary process.

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[14] *Supra*, footnote 6.

The following provisions are proposed for inclusion in correctional legislation:

Use of Force

Objective

1 To maintain a safe and secure environment in institutions by the use of minimum force, where necessary.

Definitions

2 "Deadly force" is force which is intended or is likely to cause death or serious bodily injury.

"High-level security institution" is one in which a criterion for inmate placement is that an inmate must be judged to pose a significant risk of escape and of violent behaviour if at large.

"Major disturbance" is a situation where the day-to-day activity of the institution is disrupted to a significant degree by inmate violence or extensive property damage, and necessitates the placing of inmates in lock-up conditions.

"Non-deadly force" is force which is neither intended nor likely to cause death or serious bodily injury.

General Rule

3 Subject to the provisions of this part, all correctional staff who are required or authorized by law to do anything in the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

Deadly Force

4 Deadly force may only be used as a last resort and then only in the following circumstances:

a) to prevent escape from a high-level security institution where the staff member believes on reasonable grounds that no less intrusive measure will prevent the escape;

b) where the staff member believes on reasonable grounds that deadly force is necessary to prevent an act which would likely result in death or severe bodily injury to one's self or to another person; or

c) upon the authorization of the institutional head, deadly force may be used to end a hostage-taking situation or major disturbance, where attempts at negotiation and the use of non-deadly force have failed to end the disturbance.

5 Wherever possible, the Deputy Commissioner of the region should be consulted prior to the authorization of the use of deadly force.

6 When deadly force is used, the following steps shall be undertaken:

a) an immediate notification of its use shall be given to the Deputy Commissioner of the region and the police department having jurisdiction in the area;

b) all injured persons shall immediately be given a medical examination and, where necessary, treatment; and

c) a report written by the staff member(s) using the deadly force shall be filed with the above-noted officials. Such reports shall include:

i.) an account of the events leading to the use of deadly force,

ii.) a precise description of the incident and the reasons for employing the deadly force,

iii.) a description of any weapons and the manner in which they were used,

iv.) a description of the injuries suffered, if any, and the treatment given, and

v.) a list of all participants and witnesses to the incident.

Non-Deadly Force

7 Non-deadly force may only be used where there exists an immediate threat to the institution or community, and there is no reasonable alternative available to ensure a safe environment. In every case, no more force than necessary shall be used.

8 Non-deadly force may only be used in the following circumstances:

- a) prior to the use of deadly force in situations justifying the use of deadly force;
- b) to prevent escapes;
- c) in defending one's self, other staff, and other inmates against physical assault;
- d) to prevent or quell a disturbance;
- e) to prevent serious damage to property; or
- f) to enforce institutional regulations where the staff member believes on reasonable grounds that the act threatens the safety or security of the institution.

9 Wherever possible, the institutional head should be consulted prior to the use of non-deadly force.

10 After the use of non-deadly force, the following steps shall be undertaken:

- a) a notification of the use of force shall be given to the institutional head;
- b) all injured persons shall immediately be given a medical examination and if necessary, treatment;
- c) a report written by the staff member who employed the non-deadly force shall be filed with the Deputy Commissioner of the region. Such report shall include:
    - i.) an account of the events leading to the use of non-deadly force,
    - ii.) a precise description of the incident, and the reasons for employing the force,
    - iii.) a description of the weapons used, if any, and the manner in which they were used,
    - iv.) a description of the injuries suffered, if any, and the treatment given, and
    - v.) a list of all participants and witnesses to the incident.

PROTECTIONS

One of the most difficult issues surrounding the use of force is the extent to which public officers such as corrections staff members should be protected for *bona fide* mistakes.

Generally, public officers are protected from criminal and civil liability for the use of force as long as they do not use excessive force, and their actions are taken upon reasonable and probable grounds. The amount of force deemed necessary in a certain situation will be judged objectively (i.e. based on what the reasonable person would have done in the same situation). This is so even if the particular individual might have been stopped with somewhat less force, due to some vulnerability not apparent to the officer. The courts have also stated that what is reasonable will depend on the circumstances as they existed when the force was used (i.e. not with the benefit of hindsight), and keeping in mind that the officer could not be expected to measure the force used with exactitude.[15]

Generally, the criminal law provides a defence for a mistake of fact which, if true, would excuse the accused from criminal responsibility. However there are certain qualifications on a mistake that will excuse an offence. In all cases the mistake must be innocent - the accused must believe that he or she is not committing a wrongful act. The mistake must also be honest - one that is actually made by the accused. In most cases the mistake must also be reasonable - one that a reasonable person in the accused's position would make.[16]

The *Criminal Code* contains some provisions to protect public officers in certain situations. Section 25(2) excuses a person executing process or carrying out a sentence, notwithstanding that the process or sentence is defective. The officer must, however, act in good faith. The Law Reform Commission recommends the retention of this provision "because persons acting in good faith for the purpose of law enforcement should not be required to "second guess" the validity of court orders or set themselves up as informal courts of appeal."[17]

Section 28 of the *Code* protects public officers from criminal responsibility where a mistake is made in the identity of the accused:

> 28(1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable and probable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.
>
> (2) Where a person is authorized to execute a warrant to arrest,

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[15] *Supra*, footnote 7.

[16] *Supra*, footnote 8, at 72.

[17] *Ibid*, at 117.

> a) everyone who being called upon to assist him, believes that the person in whose arrest he is called upon to assist is the person named in the warrant, and
>
> b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,
>
> is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

In the correctional context, should a staff member be protected where he assaults a visitor, believing that visitor to be an inmate trying to escape? Another difficult situation would be the application of force on an inmate who appears to be choking another, but where in fact they were just "rough-housing." What about the use of deadly force to stop an assault by an inmate on a correctional staff member, which results in the death of an innocent inmate or other bystander? Are the present *Criminal Code* provisions adequate to deal with such interactions?

Most of the case law on this subject has dealt with the civil liability of police officers in the use of deadly force to arrest. Generally the issue has been whether or not excessive force has been used or whether the officer was acting in the execution of his duty. Where officers were gaining in their pursuit of a fleeing suspect[18], or where the suspect was shot after being struck twice in the head with a gun[19], the courts found the officers liable, because the escape could have been prevented by other reasonable and less violent means. Section 25 of the *Code* can, however, relieve officers of liability in respect of the accidental shooting of an innocent bystander where they are executing their duty under s.25(4) without negligence[20]. Another case held that police officers were negligent and used excessive force where a fleeing armed robber jumped on a school bus. Police and suspects exchanged shots and a child on the bus was killed. In holding the police negligent, the court stated there was no justification for using firearms in such close proximity to children.[21]

Is peace officer status necessary to invoke the *Criminal Code* protections? The general protection concerning advancement of justice (s.25(l) of the *Criminal Code*) applies to anyone who has a legal duty to perform. So too does the provision protecting officials if the process or sentence is defective. Section 25(4) however authorizes only peace officers to use deadly force to effect an arrest of a fleeing suspect, but only where the escape cannot be prevented by reasonable means in a less violent manner. Do correctional staff need this kind of authorization/protection in carrying out their mandate? If a criminal offence occurs in an institution, the local law enforcement agency is called in to investigate and lay criminal charges where appropriate. In any event, staff would be protected by our proposed provision specifically authorizing use of deadly and non-deadly force to prevent escapes.

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[18] *Woodward v. Begbie et. al.* (1961), 132 C.C.C. 145.

[19] *Vigneth v. Bond* (1928) 37 Man. L.R. 435.

[20] *Poupart v. LaFortune* (1974) 41 D.L.R. (3d) 720.

[21] *Sa c. P.G. du Qué.* (1981) C.S. 81.

The common law defence of mistake of fact applies to all persons and its availability will depend on the particular circumstances - was the mistake innocent, honest and reason able in the circumstances? The correctional context does not appear to require additional provisions, although the context will of course be relevant to the reasonableness of the mistake.

The principles underlying the present *Criminal Code* provisions regarding the excessive use of force appear appropriate - public officers are liable for excessive force used in the performance of their duties. This will be judged by the court asking two questions - was the force necessary or could the objective be achieved with a lesser degree of force? and secondly, was it reasonable to pursue the objective with the amount of force used, even though no lesser amount would have sufficed? In answering these two questions the court will look at all the circumstances and will evaluate conduct in light of the conditions of prison life. Given the countless number of situations which might involve the use of force in a penitentiary setting, it seems unrealistic to try to legislate detailed rules as to what constitutes excessive force in a particular situation.

However, even though the current law on protections appears appropriate to the correctional setting, the Working Group believes for reasons of clarity, certainty, and accessibility that these protections should be stated in correctional legislation. The following is proposed:

Staff Protections

Objective

1 To ensure that correctional staff are adequately protected from criminal and civil liability when performing their duties in a reasonable manner.

Minimum and Necessary Force

2 Correctional staff are protected from criminal and civil liability in the use of authorized force in performance of their duties under correctional legislation.

Excessive and Negligent Use of Force

3 Nothing in this *Act* excuses criminal or civil liability for the excessive or negligent use of force by a staff member.

Mistake

4 Where a correctional staff member, acting in good faith, receives or detains a person pursuant to a warrant of committal, that member is protected from criminal and civil liability in respect thereof, notwithstanding any defect or lack of jurisdiction with respect to the warrant, or that the person detained is not the person named in the warrant.

PART IV: ACCOUNTABILITY

The need to ensure accountability of state officials such as police officers and correctional staff members cannot be over-estimated. This is reflected in *CLICS*, most notably in the following two principles:

j) in order to ensure equality of treatment and account ability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure.

It is obvious that state officials must act in accordance with the *Charter*, and within the bounds of applicable legislation and case-law. There is also a need for extra-legal accountability mechanisms which operate outside of the system of judges and courtrooms.

Virtually all police agencies are subject to various forms of extra-legal accountability. Most police officers are subject to a code of discipline contained in their governing legislation. In addition, most departments have developed specific guidelines which are aimed at internal accountability. Augmenting this are public complaint bureaux set up to allow a more impartial examination of public complaints about the police. Such extra-legal accountability mechanisms are designed not only to ensure order and discipline within the police department concerned, but also to protect both the public in general and the interests of the complainant.

The need for accountability in the correctional system recognized in *CLICS* is expressed as well in several principles developed in the *Correctional Philosophy* Working Paper, particularly:

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

This Part will discuss the accountability mechanisms currently in place with respect to actions of penitentiary staff, and explore a proposal for an independent Complaints Review Committee.

INTERNAL ADMINISTRATIVE PROCEDURES

Under s.6 of the *Penitentiary Regulations*,

> It is the duty of every member of the Service to familiarize himself with the Act, Regulations and the directives that are issued, from time to time, under the Act.

The Commissioner's Directives prescribe the policy and the procedures for all areas of operations in the institution. In many areas the directives are quite specific with respect to the procedure to be followed, and set out the consequences (legal or otherwise) for failure to follow the prescribed procedures.

INSPECTOR GENERAL

The Inspector General and staff have a mandate to conduct internal reviews, audits, inquiries and investigations. This Branch conducts independent internal audits, both financial and management. The purpose of these systematic reviews is to advise management of the efficiency and effectiveness of internal management practices. Until 1986 the other main function of the Office of the Inspector General was to conduct special inquiries at the request of the Solicitor General or Commissioner of Corrections. Generally the Inspector General would be asked to conduct a special inquiry where there had been a serious security incident involving an inmate or allegations of improper treatment or conduct by a staff member. Since 1986, the special inquiries function has been delegated to the regional offices of CSC. Although this move is itself under review, the findings of special inquiries have been used primarily as management information, and have only rarely been used as the basis for disciplinary action.

CODE OF CONDUCT AND STAFF DISCIPLINE SYSTEM

This document outlines the appropriate conduct for correctional employees and gives the disciplinary consequences for misconduct. For our purposes there are two major infractions of interest - neglecting one's duty or refusing to take action as a peace officer, and using excessive force or more force than necessary to carry out one's legal duties. The disciplinary penalty for these infractions is suspension without pay or discharge. For the minor infraction of "failing to conform to or apply any Commissioner's Directive, Divisional Instruction, Standing Order or other directive as it relates to his/her duty", a written reprimand or suspension without pay is prescribed.

The staff discipline process for the Correctional Service of Canada is the same procedure which applies to all federal public servants. Upon allegations of misconduct by a staff member, the manager responsible informs the employee of the allegation and that he or she will be investigating the matter. The employee is given an opportunity to get union representation and to respond to the allegations. The manager then decides on any disciplinary action to be taken.

Staff are protected by a grievance procedure, which entails four levels of response (Assistant or Deputy Warden, Warden, Regional Deputy Commissioner, and Commissioner). If the subject of the grievance is the interpretation of an article in the collective agreement, or entails a disciplinary penalty (fine, suspension or discharge), the grievance can be referred to arbitration by the Public Service Staff Relations Board. Thus, employees have a number of protections against arbitrary disciplinary action by management.

INMATE GRIEVANCE PROCEDURE

The inmate grievance procedure allows inmates to submit grievances concerning any problems they have experienced while confined which are within the jurisdiction of the Commissioner of Corrections. As a matter of policy, however, any elements of an inmate grievance which could result in discipline of a staff member are removed from the inmate grievance procedure and go directly to the responsible manager. Because allegations of abuse of staff powers or misuse of force, if true, would likely result in disciplinary action, the inmate grievance procedure is rarely appropriate. However, grievances are a useful tool to encourage compliance with correctional policy. Suggestions for improvements to the inmate grievance system are made in the *Correctional Authority and Inmate Rights* Working Paper and include final resolution of grievances by an independent arbiter.

The above mechanisms have several purposes - to ensure that the organization is functioning efficiently, to provide for an independent official to audit and investigate unusual incidents, and to ensure that those who have been delegated power can account for the discharge of the authority conferred. These mechanisms should protect both inmates and staff by recognizing abuses of power, and taking corrective action to deter further abuses. However one of the problems associated with these kinds of controls is that they are internal, and thus are closed to public scrutiny. There are however, other mechanisms in place which provide some public scrutiny.

THE COURTS

As discussed in the *Correctional Authority and Inmate Rights* Working Paper, judicial remedies are available to ensure the legal rights of inmates. Our judicial system offers what no internal accountability mechanism can - true independence of the decision-maker and the public forum of the courtroom.

Current CSC policy is that if there are indications of excessive force used against an inmate, the institutional head must notify the local Crown prosecutor or police force. The Crown prosecutor can then decide whether to lay criminal charges against the staff member (e.g. assault, criminal negligence causing death, wounding). Serious abuses of staff powers must be censured in an open public forum and criminal sanctions imposed (e.g. probation, fine, imprisonment) in order to make it clear to all concerned that our correctional system is subject to the rule of law and that misuse of physical force is not acceptable in our prisons.

Inmates may also use the civil court system to get compensation for any damages suffered due to staff misuse of exceptional powers - any permanent or temporary physical injury, mental distress, or property damage.

However the judicial process (especially for civil suits) is often expensive and time consuming. Often by the time judgement is rendered, the inmate will have been released. More immediate solutions to complaints about staff misconduct are needed, but also solutions which involve an independent investigator and arbiter of the complaint to ensure fair treatment to both staff and inmates.

COMPLAINT REVIEW COMMITTEE

The institution of a public complaints bureau, similar to those found in some police departments, was explored in a study done for the Correctional Service of Canada in 1984.[22] (The concept of civilian review boards to control the discretionary powers of police was introduced in 1931, and the first board was created in Washington in 1948. In Canada boards were established in Montreal in 1978, and in 1981 in Toronto). Currently, amendments to the *RCMP Act* are being implemented which include the establishment of both an External Review Committee to deal with employee grievances, and a Public Complaints Commission to review complaints by the public of alleged misconduct of RCMP officers.

The proposal suggested for corrections involves legislating the duties of all correctional employees (Part I) and providing for a Complaint Review Committee to handle inmate or public complaints concerning alleged staff misconduct (Part II). The system would function within the present framework of the collective agreement, staff disciplinary process and employee grievance procedure.

The study notes that in terms of the power which goes along with their position, CSC staff are more akin to police officers than other public servants - they are in a position of authority over inmates and have extensive powers which can be abused. Their positions of authority are on-going, and thus may foster hostility and conflicts by their very nature. The system proposed is aimed at informing staff members of their duties, asserting the authority of the supervisors, and stressing the protection of inmates' dignity and rights and the settlement of their justified complaints. The study notes that the credibility of a complaint handling system depends on its impartiality, in both fact and appearance.

The study proposed that a Complaint Review Committee be established in each of CSC's five regions. The Committee would be composed of a Chairperson, three residents of the region who are not members of the Service or a police force, and three employees of CSC from that region. Any person with a complaint about the conduct of an employee should have the right to file a complaint with the Committee. The complaint would have to be filed within 90 days of the incident and include the time, place and any witnesses to the incident. The employee would be informed of the complaint. The Committee would not normally hear witnesses or allow representations.

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[22] See Ouellette, Yves, *Regulating the Conduct of Officers and Employees of the Correctional Service of Canada*, and *Regulations Respecting the Conduct and Discipline of Employees in the Correctional Service of Canada and the Handling of Inmate Complaints*, unpublished, April 1984.

The Committee could reject the complaint where it believes the complainant does not have a valid case or where it is made in bad faith, or is not within its jurisdiction. The rejection would be forwarded to the complainant and employee with brief reasons. Complaints which are not rejected would then either be forwarded to the employee's director for internal investigation, or to the Correctional Investigator for formal investigation.

Once the director's or Correctional Investigator's report is Received, the Committee could request further information, reject the complaint if unjustified, or, if justified, forward the case to the appropriate authority to impose the disciplinary action recommended by the Committee. The Committee could recommend the following disciplinary actions - verbal warning, written reprimand, suspension without pay for no more than 60 days, or dismissal. Once disciplinary action is taken by the supervisor against the employee, the current employee grievance mechanism would apply.

The Committee would also have authority to reject a complaint as unjustified, or to forward to the employee written observations aimed at preventing a breach of discipline. It could also make general recommendations to the Commissioner or Minister concerning improvements to the complaint process.

The Working Group agrees with the Study's discussion of the need for accountability mechanisms. However it is not persuaded of the utility of yet another supervisory body. Inmate grievances about staff will be directed to the institutional head who will deal with them through the normal staff discipline process outlined above. Inmates are of course entitled to report allegations of abuse to the police. Finally, inmates who are unhappy with the institutional head's disposition of a complaint against staff may take their complaint directly to the Correctional Investigator.

CORRECTIONAL INVESTIGATOR

This official is appointed pursuant to Part II of the *Inquiries Act* to investigate on his or her own initiative, on request from the Solicitor General, or on complaint from penitentiary inmates, and report upon problems of inmates coming under the responsibility of the Solicitor General of Canada. The Correctional Investigator submits an annual report to the Solicitor General with recommendations for change. This report is tabled in Parliament. In 1984-85 only 26 complaints (less than 2%) dealt with the use of force, and only 92 (less than 6%) dealt directly with complaints about staff.

Under the Inquiries Act, the Correctional Investigator and staff are authorized to enter and remain in any public office or institution, to examine all papers, records and books pertinent to the inquiry, to summon any person and require that person to give evidence under oath, and to issue subpoena commanding anyone to appear and testify, or to produce any document relevant to the inquiry.

The Correctional Investigator already has a broad mandate to investigate and report on problems of inmates, including complaints regarding staff and complaints about the use of force. Proposed legislative provisions to govern the Office of the Correctional Investigator are set out in the *Correctional Authority and Inmate Rights* Working Paper.

It is the opinion of the Working Group that legislation should also include the power to make recommendations to the institutional head as to appropriate disciplinary action. The institutional head would then have a short time (for example, 10 days) to institute disciplinary proceedings or inform the Correctional Investigator of his or her reasons for not doing so. The Correctional Investigator would also be empowered to recommend changes in procedures aimed at preventing abuses of staff powers in the future.

The additional provisions might read as follows:

Correctional Investigator

1 Where the Correctional Investigator conducts an investigation into a complaint about the conduct of a staff member and is of the view that the complaint is justified, the Correctional Investigator may

a) recommend to the institutional head that appropriate disciplinary action be taken; and

b) recommend changes in procedures aimed at preventing similar abuses in the future.

2 Where the Correctional Investigator makes a recommendation to an institutional head with respect to disciplinary action, the appropriate disciplinary proceedings should be instituted within ten days of the receipt of the recommendation, or the Correctional Investigator is to be informed of the reasons why no action is being taken.

Although the Working Group is of the view that effective accountability mechanisms must be available to ensure recourse in the event of staff misconduct, the focus of this paper has been the development of rules to delineate staff powers, and the use of force and protections for staff. Consistent with the approach taken in the *Framework* paper, it is our view that clarity of purpose, together with a clear articulation of staff roles, powers and responsibilities, will engender voluntary compliance with not only the letter but also the spirit of any new correctional legislation.

CONCLUSION

The role played by correctional staff is crucial to the achievement of the mandate of the correctional agency - that of contributing to a just, peaceful and safe society by providing a safe, secure and healthful environment on a day-to-day basis and by promoting the successful re- integration of offenders into society. In order to achieve the purpose of corrections, staff need clear direction and guidance concerning the overall mandate of the agency and their specific roles in achieving the mandate.

The reader has been presented in this paper with a set of proposals designed to provide this direction. The proposals were formulated as legislative provisions in order to generate discussion about what degree of specificity is appropriate in correctional legislation and what impact such proposals might have on operations. The Working Group wishes to receive responses to these proposals, as well as any comments on other issues you may consider relevant to staff powers.

APPENDIX "A"

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Native Offenders

Mentally Disordered Offenders

Sentence Computation

The Relationship between Federal and Provincial Correctional Jurisdictions

International Transfer of Offenders

APPENDIX "B"

CORRECTIONAL SERVICE OF CANADA
STANDARD POSITION DESCRIPTION

Job Title: Correctional officer
Maximum Security Institution

Level: CX-COF 2

SUMMARY

Under the supervision of a senior custodial officer, maintains surveillance over the inmates at a post such as a cell block, yard, dome, cage, tower or recreational area; controls the movement of inmates and other persons in institutional areas and to and from the institution; ensures the cleanliness and security of the post; and performs other duties.

DUTIES

Maintains surveillance over the inmates during a shift of custodial duty at a post such as a cell block, kitchen, yard, dome, cage, tower, or recreational area in a maximum security institution operating its custodial staff on a squad system with scheduled rotation of shifts and posts,

- by closely observing activities of inmates when making periodic rounds of cells or standing watch on armed cage or tower duty to ensure discipline and detect suspicious or unusual behaviour,

- by counting the inmates, as required by the standing orders of the institution, at specific times and places, to account for their presence or absence, and recording and reporting the count to the superior officer,

- by searching inmates at specific times or for particular reasons to ensure that they are not in possession of contra band such as knives, firearms, drugs, brew or its ingredients, and

- by observing the dress and behaviour of inmates, taking corrective action in routine cases, and reporting on unusual behaviour or infractions of rules.

Controls the movement of inmates and other persons in institutional areas and to and from the institution,

- by unlocking and locking cell doors and barriers to permit inmates and staff to move in and out as authorized,

- by assembling, counting and escorting a group of inmates proceeding on meal, sick, dental, work, exercise, church and recreational parade,
- by acting as special escort for a prisoner being admitted, released or transferred, or reporting for interview or treatment in another area,
- by inspecting inmate passes, ensuring legitimacy of staff visits, and identifying and registering persons seeking admittance at the front entrance,
- by accompanying maintenance men to the work area, and
- by screening and searching all vehicles, trucks, cars and drivers entering or leaving the prison premises.

Ensures the cleanliness and security of the post,

- by inspecting the area for orderliness, cleanliness and needed repairs,
- by issuing supplies and supervising regular cleaning by inmates of such areas as cells and kitchens,
- by examining furniture, bedding, mattresses, personal effects, floors, windows, ventilators, bars and locks for evidence of contraband, tampering, destruction or attempts at escape,
- by checking for potential fire and safety hazards,
- by cleaning and guarding the key room, controlling the issue of keys, testing the fire siren, ensuring that emergency firearms, ammunition, gas equipment and night emergency lights are in good working condition and available, and
- by cleaning armoury and weapons, taking daily inventory, controlling the issue and return of arms as specified in standing orders.

Performs other duties, when posted to dissociation, admission and pre-release areas, such as overseeing bathing and dressing of inmates, carrying in meals, giving medication, noting scars, tattoos or other distinguishing marks and listing articles of clothing and personal effects on admission, and preventing inmate contacts on pre-release to prevent passage of messages and letters.

Job Title: Living Unit Officer
Medium Security Institution

Level: CX-LUF 1

SUMMARY

Under the supervision of the Living Unit Supervisor and the functional supervision of the Living Unit Development Officer for case management activities, maintains control and supervision of inmates and the security of the living unit and the institution; performs a variety of casework services relating to those inmates assigned specifically to his caseload; participates as an active member of the Living Unit Team in the operation of a program directed towards the positive correctional control of inmates and performs other related duties as required.

DUTIES

Maintains control and supervision of inmates and the security of the living unit and institution by:

- conducting regular checks to ensure that doors, barriers, keys and other security equipment are in good order and are safeguarded;
- operating security and communications equipment;
- searching inmates, cells, rooms and other areas to prevent possession or passage of contraband;
- counting inmates formally and informally at various times and regulating individual and group movement;
- reporting breaches of discipline;
- observing inmates' activities and intervening in an appropriate manner when necessary;
- supervising inmate activities in the unit and institution such as recreation programs and special events;
- maintaining good housekeeping standards including the reporting and/or correcting of fire and safety hazards;
- maintaining the security of information gained in the course of carrying out the duties of this position;

- participating in an active Preventive Security Program involving recognition skills, information gathering, correlation and reporting;
- communicating information regarding the security of the unit and institution to Living Unit Team members and other appropriate institutional staff members;
- recording and/or reporting security-related information as specified in standing orders and other directives.

Performs a variety of casework services relating to those inmates specifically assigned to his caseload by:

- establishing effective interpersonal relationships as a means of positively influencing the inmate's resocialization process;
- participating in an orientation process for all new inmates;
- acting as the inmate's initial contact for all requests or problems;
- assessing individual situations to either take appropriate action or make necessary referrals;
- obtaining detailed knowledge of individual inmates through a system of file review, observation and exchange of information with instructors and supervisors;
- working closely with his Living Unit Development officer in all areas of casework management to foster a team approach designed to meet inmate needs;
- participating as a permanent member in case management teams to assist in the analysis, planning, monitoring and evaluation of all individual cases as specified in the Case Management Manual;
- writing accurate, complete and timely reports as specified in the Case Management Manual and other directives and compiling up-to-date records;
- counselling inmates to avail themselves of opportunities to address their personal needs;
- assisting inmates to reach program goals;
- escorting inmates on temporary leave of absence to visit families, agencies, potential employers, etc., in preparation for eventual release;
- meeting with agencies, inmates' families and friends, potential employers, etc., to advise of inmates' plans and progress within the bounds of confidentiality.

Participates as an active member of the Living Unit Team in the operation of a program directed towards the positive correctional management of inmates by:

- attending and participating in Living Unit Team Meetings to develop and implement effective unit policy and procedures;
- participating with other Team members and inmates in the planning, implementation and supervision of activities or special projects for the unit and the institution;
- communicating effectively with other institutional staff ensuring that standards set by the unit and the institution are met;
- establishing active and effective relations with inmates to encourage self-improvement, self-understanding and self-respect;
- representing Team views and recommendations at various institutional boards and meetings dealing with such matters as earned remission, work placements, cells changes, planning and evaluation;
- participating as a member of the Adjustment Committee within the unit;
- attending and taking an active part in meetings and group discussions held within the unit;
- supporting and assisting outside individuals or groups who are engaged in activities programmed for inmates;

training new officers.

- Performs other duties as required:
- supervising the living unit in the absence of the supervisor;
- supervising work details in the unit;
- keeping abreast of current literature and new developments in the correctional field, including routine orders, standing orders, divisional instructions, commissioner's directives;
- participating in/or conducting inquiries.

APPENDIX "C"

PRESENT STAFF POWERS

Penitentiary Service Regulations:

40(1) Where the institutional head is satisfied that

j) for the maintenance of good order and discipline in the institution, or

k) in the best interests of an inmate it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly, but the case of every inmate so dissociated shall be considered, not less than once each month, by the Classification Board for the purpose of recommending to the institutional head whether or not the inmate should return to association with other inmates.

(2) An inmate who has been dissociated is not considered under punishment unless he has been sentenced as such and he shall not be deprived or any of his privileges and amenities by reason thereof, except those privileges and amenities that

a) can only be enjoyed in association with other inmates, or

b) cannot reasonably be granted regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

41(1) Everyone who

a) delivers or attempts to deliver contraband to an inmate,

b) receives or attempts to receive contraband from an inmate,

c) trespasses upon penitentiary lands, or

d) assists any person to do anything mentioned in paragraphs (a), (b) or (c),

is guilty of an offence punishable on summary conviction and is liable to imprisonment for six months or to a fine of $500, or both.

41(2) Subject to subsection (3), any member may search

a) any visitor, where there is reason to believe that the visitor has contraband in his possession, and if the visitor refuses to be searched he shall be refused admission to or escorted from the institution;

b) any other member or members, where the institutional head has reason to believe that a member or members has or have contraband in his or their possession;

(c) any inmate or inmates, where a member considers such action reasonable to detect the presence of contraband or to maintain good order of an institution; and

(d) any vehicle on institutional property where there is reason to believe that such a search is necessary in order to detect the presence of contraband or to maintain good order of the institution.

(3) No female person shall be searched pursuant to subsection (2) except by a female person.

(4) There shall be a sign posted at the entrance to an institution, in a conspicuous position, to give warning that all vehicles and persons on institution property are subject to search.

APPENDIX "D"

PEACE OFFICER POWERS & PROTECTIONS

Criminal Code: references, updated as necessary, summarized by the Police Powers Project (of the Criminal Law Review) and extracted from its unpublished discussion paper entitled "Definition of Police Officer/Peace Officer" (Ottawa: Department of Justice, 1984)

1. Arrest and Release

a) Powers

Section	
450(1)	Power of peace officer to arrest without warrant.
450(2)	Circumstances in which a peace officer should not effect an arrest without warrant against a person.
451	Circumstances in which a peace officer should issue an appearance notice to a person whom he did not arrest in accordance with the provisions of section 450(2).
452	Release from custody by peace officer in situation of arrest without warrant for summary conviction offence, hybrid offence or offence falling within the absolute jurisdiction of a magistrate.
448	An officer in charge is defined as the officer for the time being in command of the police force responsible for the lock-up or a peace officer designated by him who is in charge of such place.
453	Release from custody by officer in charge in cases of arrest without warrant.
453.1	Release from custody by officer in charge in cases of arrest with warrant and conditions for release.
454(1)	The power of a peace officer or officer in charge to release a person detained in custody conditionally or unconditionally.
455.5(2)	Service of a summons shall be made by a peace officer.
456.2	An arrest warrant is directed to the peace officer within the territorial jurisdiction of the justice, court or judge by whom it is issued.

456.3	Execution of arrest warrant by peace officers.
458(2)	A peace officer can arrest without warrant a person who has violated a summons, appearance notice, undertaking or recognizance or committed an indictable offence after having received a summons, appearance notice or entering into an undertaking or recognizance.
459(6)	A peace officer can arrest without warrant a person who has violated or is about to violate an undertaking or recognizance which he or she has entered into after a 90-day review or a 30-day review pursuant to section 459 of the *Code*.
461(2)	An endorsement upon an arrest warrant by a justice from another territorial jurisdiction is sufficient authority to the peace officer to whom it was originally directed and to all peace officers within the territorial jurisdiction of the endorsing justice to execute the warrant and take the accused before the justice who issued the warrant or another justice for the same territorial division.
545(4)	When an accused is found to be insane pursuant to Part XVII, and discharged on conditions by order of the Lieutenant Governor, a peace officer may arrest a person without warrant if on reasonable and probable grounds he believes the person has violated any condition of his discharge.
632(l)	A peace officer can arrest with warrant a person, bound by a recognizance to give evidence, who has absconded or is about to abscond.
700(2)	When an order is made by the Court, relieving a surety of his obligations to an accused person and a warrant of committal is accordingly obtained, a peace officer or the surety can arrest that person.

b) Duties

452	Duty of peace officer in respect of the release of persons arrested without warrant for certain classes of offences.
454(l)	Duty of peace officer to bring detained person before a justice to be dealt with according to law within 24 hours or as soon as possible.
545(5)	Duty of peace officer to bring a person arrested without warrant pursuant to section 545(4) before a justice within the prescribed time (this concerns the person, discharged on conditions, who had been detained by reason of insanity).

c) Special Protection and Immunity

25(4) A peace officer, proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant (and everyone assisting the peace officer), is justified in using as much force as necessary to prevent the escape by flight of the person, unless the escape can be prevented by reasonable means in a less violent manner.

28 A person authorized to execute a warrant for arrest, and everyone called upon to assist him/her, who believe in good faith and on reasonable and probable grounds that the person whom he arrests is the person named in the warrant, is protected from criminal responsibility to the same extent as if the arrested person where the person named in the warrant.

450(3)(a) A peace officer who arrests a person without warrant is deemed to be acting lawfully and in the execution of his/her duties for the purposes of any proceedings under the *Criminal Code* or under any other Act of Parliament.

452(3)(a) The peace officer having arrested a person without warrant who does not release the person from custody as soon as practicable shall be deemed to be acting lawfully and in the execution of his/her duty for the purposes of any proceedings under the *Criminal Code* or under any other Act of Parliament.

454(4)(a) A peace officer who does not release a person, arrested without warrant as a person about to commit an indictable offence, within the time period prescribed in the section for taking the person before a justice, shall be deemed to be acting lawfully and in the execution of his/her duty for the purposes of any proceedings under the *Criminal Code* or under any other Act of Parliament.

d) Miscellaneous

449(3) A person who is not a peace officer who makes an arrest must turn over the arrested person forthwith to a peace officer.

453(l) Release from custody by officer in charge of persons arrested without warrant by peace officer or delivered to peace officer pursuant to section 449(3).

453.3(5) The manner of proof of the issuance of an appearance notice by a peace officer.

455.5	The service by a peace officer and manner of proof of the issuance of a summons.
457(4)	A condition for release on judicial interim release could be an obligation to report to a peace officer.
526(3)	A person released after arrest on a bench warrant pursuant to section 526(l) could be required as a condition of release to report to a peace officer.

2. Breach of Peace

a) Powers

31(l)	A peace officer can arrest a person committing a breach of the peace or anyone he/she believes on reasonable and probable grounds is about to join in or renew a breach of the peace.
31(2)	A peace officer is justified in receiving into custody any person given into his/her charge for having breached the peace.
32(l)	A peace officer is justified in using or ordering the use of as much force as on reasonable and probable grounds he/she believes necessary to suppress a riot and not excessive.

b) Duties

33	Duty of peace officer, after a section 68 proclamation is made or an offence under section 69 is committed, to disperse or arrest persons who do not comply with the proclamation.

c) Special Protection and Immunity

32(l)	A peace officer is justified in using or authorizing the use of force to suppress a riot and which force is not excessive having regard to the danger to be apprehended from the continuance of the riot.
32(4)	Before it is possible to secure the attendance of the peace officer, anyone is justified in using as much force as he/she believes on good faith and on reasonable grounds is necessary to suppress a riot and is not excessive having regard to the danger to be apprehended from the continuance of the riot.
32(2)	No civil or criminal proceedings lie against a peace officer (or a person assisting a peace officer) in respect of any death or injury caused by the

peace officer (or the person assisting) in dispersing or arresting persons after a proclamation under section 68 has been effected.

d) Miscellaneous

30 A person is justified in intervening to prevent the continuation or recurrence of a disturbance of the peace and giving over to the custody of a peace officer an individual detained by him/her for breach of the peace.

3. Search and Seizure

a) General Powers Section

443(l) A peace officer can apply for and execute a search warrant.

443(4) A peace officer can execute a search warrant in a territorial division other than that in which it was obtained after an endorsement procedure has been carried out.

b) Specialized Search Provisions

181(1) A peace officer has powers of search under warrant of gaming and bawdy-houses.

181(2) A peace officer has power to take into custody any person whom he finds keeping a common gaming house or any person found therein.

299(3) A peace officer can enter any place to find lumber owned by a person and bearing a registered trade mark of that person when the lumber is detained without the consent of the owner.

420(2) A peace officer can seize and detain counterfeit money, counterfeit tokens of value, and machines, engines, tools, instruments for use in making counterfeit money or tokens.

4. Wiretap

a) Powers

178.12(l) An application for an authorization for an interception of private communications must be accompanied by an affidavit of a peace officer or public officer deposing to the matters prescribed.

178.13(3) Application for renewal of authorization for purpose of interception of private communication must be accompanied by an affidavit of either a peace officer or a public officer deposing to the matters prescribed.

178.15(l)	In situations of urgency, peace officers specially designated by the Solicitor General of Canada or the Attorney General of a province can make an application to a judge for authorization to intercept private communications (without requirements of section 178.12).
178.2(2)(e)	The disclosure of Intercepted private communications to peace officers in the interests of the administration of justice does not constitute an offence.
178.23(5)	An application to delay notice to a person subject to interception of private communications is accompanied by an affidavit of a peace officer or public officer deposing to the matters prescribed.

b) Miscellaneous

178.22(k)	The annual report to Parliament must record the number of persons arrested whose identity became known to a peace officer by reason of interception of private communications.

5. Firearms

a) Powers

90(l)(b)	A peace officer or a public officer of a class prescribed by regulations can have in his/her possession a restricted or prohibited weapon for purposes of employment.
96(l)(b)	A peace officer or a public officer of a class prescribed by regulations can import or otherwise acquire possession of any weapon, component or part of weapon in the course of duties or employment.
98(4)	A peace officer can apply to a magistrate for an order prohibiting a particular person from possessing a firearm, ammunition, or explosive substance when he has reasonable grounds to believe that the possession is not desirable in the interest of the safety of any person.
99(1)	A peace officer can search without warrant a person, vehicle or place (not a dwelling place) and seize anything in relation to the offence when he/she on reasonable and probable grounds believes an offence in respect of a prohibited weapon, restricted weapon, firearm or ammunition, has been or is being committed.
100(1)	A peace officer can seize restricted weapons from possession of a person when there is non-production of a registration certificate or permit. A peace officer can seize a firearm from a person under the age of 16

years who does not produce a permit. A peace officer can seize a prohibited weapon from any person.

101(2) A peace officer can without warrant search for and seize any firearm, offensive weapon in the possession of a person when the peace officer is satisfied that the possession is not in the interests of the safety of that person or any other person.

b) Duties

100(2) Duty of peace officer to return a restricted weapon or a firearm in certain circumstances.

100(3) Duty of peace officer to bring restricted weapon or firearm before magistrate in circumstances when it is not returned to the owner.

c) Special Protection and Immunity

76.3 A peace officer engaged in the execution of his/her duty does not commit an offence by taking on board a civil aircraft an offensive weapon or an explosive substance without the consent of the owner or operator of the aircraft.

d) Miscellaneous

102(l) A person has an obligation to turn over a restricted or prohibited weapon which he/she finds to a peace officer or report such a finding to a peace officer.

102(2) A person has an obligation to report a stolen or mislaid restricted weapon to a peace officer or to the local registrar of firearms.

103(2) Persons carrying out certain types of prescribed businesses shall report to a peace officer or local firearms registrar any loss, destruction or theft of a firearm or restricted weapon and any theft of ammunition.

106.5(4) Failure to deliver up a permit, registration certificate, firearms acquisition certificate, etc. to a peace officer or local registrar of firearms, or firearms officer after an order made suspending or revoking a person's use of a firearm constitutes an offence.

6. Breathalyzer

a) Powers

234.1(1) A peace officer can demand a sample of breath for purposes of roadside breath analysis from the person driving or having care or control of a motor vehicle, vessel or aircraft.

235(i) A peace officer can demand a sample of breath for purposes of breathalyzer analysis from the person driving or who has care or control of a motor vehicle, vessel or aircraft.

b) Miscellaneous

241(3) Evidence of a failure to comply with the demand by a peace officer for samples of breath is admissible and the court can draw an adverse inference from such evidence in a prosecution pursuant to section 238 of the *Code*.

7. Process

a) Powers

629(l) Peace Officers are required to serve subpoenas (reference made to section 455.5).

455.1 Restoration of property to a complainant, when the property is before the court or has been detained, shall be executed by peace officers.

8. General Protections and immunities

a) Powers

25(l) A peace officer (as well as other persons designated in the subsection), who is required or authorized by law to do anything in the administration or enforcement of the law is justified in doing what he is required or authorized to do and in using as much force as is necessary, if he acts on reasonable and probable grounds.

S. 25(2) A person required or authorized by law to execute process or carry out a sentence, or any person assisting him, is justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective, if he acts in good faith.

S. 25(3) Subject to section 25(4), a person required or authorized by law to do anything in the administration or enforcement of the law can use force intended or which is likely to cause death or grievous bodily harm only when he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

S. 27(a) Everyone is justified in using as much force as is reasonably necessary to prevent the commission of an offence for which an offender could be arrested without warrant and which offence would be likely to cause immediate and serious injury to the person or to property belonging to anyone.

S. 27(b) Everyone is justified in using as much force as is reasonably necessary to prevent anything being done that on reasonable and probable grounds he believes if it were done would be an offence likely to cause immediate and serious injury to the person or to the property of anyone.

9. Offences Relating to Peace officers

118(a)	Resists or wilfully obstructs peace officer in the execution of his duty.
118(b)	Omits without reasonable excuse to assist peace officer in the execution of his duty in arresting a person or in preserving the peace.
119	Personation of a peace officer.
128	Public mischief (with intent to mislead causing a peace officer to enter upon an investigation).
180(l)(a)	Obstruction or delaying of peace officer in the execution of a warrant in respect of a disorderly house.
214(4)	Classification of murder as first degree when victim is a police officer, warden, instructor, keeper, guard or permanent employee of a prison, etc. (the term peace officer is not mentioned).
246(l)(a)	Assault of a peace officer in the execution of his duties.
285	Theft by bailee of anything under lawful seizure by a peace officer.

APPENDIX "E"

SUMMARY OF RECOMMENDATIONS

I Principles established in the *Correctional Authority and Inmate Rights* Working Paper:

1 Staff powers should be granted by law and should be clearly defined.

2 The purpose for which the power is granted should be clear and the power authorized should be necessary to the fulfillment of the agency's mandate.

3 In determining the appropriate staff powers for the correctional setting, the interests of staff, offenders and the public should be balanced.

4 To reduce potential arbitrariness and ensure fair treatment of individuals under sentence, controls on the use of staff powers should be established.

5 Physical force should only be used where there exists an immediate threat to personal safety, or the security of the institution or community, and there is no reasonable alternative available to ensure a safe environment. When force must be used, only the minimum amount necessary shall be used.

The following provisions are proposed for inclusion in correctional legislation:

II Use of Force

Objective

1 To maintain a safe and secure environment in institutions by the use of minimum force, where necessary.

Definitions

2 "Deadly force" is force which is intended or is likely to cause death or serious bodily injury.

"High-level security institution" is one in which a criterion for inmate placement is that an inmate must be judged to pose a significant risk of escape and of violent behaviour if at large.

"Major disturbance" is a situation where the day-to-day activity of the institution is disrupted to a significant degree by inmate violence or extensive property damage, and necessitates the placing of inmates in lock-up conditions.

"Non-deadly force" is force which is neither intended nor likely to cause death or serious bodily injury.

General Rule

3 Subject to the provisions of this part, all correctional staff who are required or authorized by law to do anything in the administration or enforcement of the law are justified in doing it and using no more force than necessary for that purpose, where they act on reasonable grounds and where no reasonable alternative exists to ensure the security of the institution or the safety of inmates or other persons.

Deadly Force

4 Deadly force may only be used as a last resort and then only in the following circumstances:

a) to prevent escape from a high-level security institution where the staff member believes on reasonable grounds that no less intrusive measure will prevent the escape;

b) where the staff member believes on reasonable grounds that deadly force is necessary to prevent an act which would likely result in death or severe bodily injury to one's self or to another person; or

c) upon the authorization of the institutional head, deadly force may be used to end a hostage-taking situation or major disturbance, where attempts at negotiation and the use of non-deadly force have failed to end the disturbance.

5 Wherever possible, the Deputy Commissioner of the Region should be consulted prior to the authorization of the use of deadly force.

6 When deadly force is used, the following steps shall be undertaken:

a) an immediate notification of its use shall be given to the Deputy Commissioner of the region and the police department having jurisdiction in the area;

b) all injured persons shall immediately be given a medical examination and, where necessary, treatment; and

c) a report written by the staff member(s) using the deadly force shall be filed with the above-noted officials. Such reports shall include:

   i) an account of the events leading to the use of deadly force,

   ii) a precise description of the incident and the reasons for employing the deadly force,

   iii) a description of any weapons and the manner in which they were used,

   iv) a description of the injuries suffered, if any, and the treatment given, and

   v) a list of all participants and witnesses to the incident.

Non-Deadly Force

7 Non-deadly force may only be used where there exists an immediate threat to the institution or community, and there is no reasonable alternative available to ensure a safe environment. In every case, no more force than necessary shall be used.

8 Non-deadly force may only be used in the following circumstances:

a) prior to the use of deadly force in situations justifying the use of deadly force;

b) to prevent escapes;

c) in defending one's self, other staff, and other inmates against physical assault;

d) to prevent or quell a disturbance;

e) to prevent serious damage to property; or

f) to enforce institutional regulations where the staff member believes on reasonable grounds that the act threatens the safety or security of the institution.

9 Wherever possible, the institutional head should be consulted prior to the use of non-deadly force.

10 After the use of non-deadly force, the following steps shall be undertaken:

a) a notification of the use of force shall be given to the institutional head;

b) all injured persons shall immediately be given a medical examination and if necessary, treatment;

c) a report written by the staff member who employed the non-deadly force shall be filed with the Deputy Commissioner of the region. Such report shall include:

   i) an account of the events leading to the use of non-deadly force,

   ii) a precise description of the incident, and the reasons for employing the force,

   iii) a description of the weapons used, if any, and the manner in which they were used,

   iv) a description of the injuries suffered, if any, and the treatment given, and

   v) a list of all participants and witnesses to the incident.

III Staff Protections

Objective

1 To ensure that correctional staff are adequately protected from criminal and civil liability when performing their duties in a reasonable manner.

Minimum and Necessary Force

2 Correctional staff are protected from criminal and civil liability in the use of authorized force in performance of their duties under correctional legislation.

Excessive and Negligent Use of Force

3 Nothing in this *Act* excuses criminal or civil liability for the excessive or negligent use of force by a staff member.

Mistake

4 Where a correctional staff member, acting in good faith, receives or detains a person pursuant to a warrant of committal, that member is

protected from criminal and civil liability in respect thereof, notwithstanding any defect or lack of jurisdiction with respect to the warrant, or that the person detained is not the person named in the warrant.

IV Correctional Investigator

1 Where the Correctional Investigator conducts an investigation into a complaint about the conduct of a staff member and is of the view that the complaint is justified, the Correctional Investigator may

a) recommend to the institutional head that appropriate disciplinary action be taken; and

b) recommend changes in procedures aimed at preventing similar abuses in the future.

2 Where the Correctional Investigator makes a recommendation to an institutional head with respect to disciplinary action, the appropriate disciplinary proceedings should be instituted within ten days of the receipt of the recommendation, or the Correctional Investigator is to be informed of the reasons why no action is being taken.

CORRECTIONAL ISSUES AFFECTING NATIVE PEOPLES

Correctional Law Review

Working Paper No. 7,

February 1988

EXECUTIVE SUMMARY

INTRODUCTION

Identifies the main focus of this paper, which is to highlight the serious problems faced by Native offenders in the correctional system, and to suggest legislative and policy approaches in correctional law reform that could ameliorate these problems. The issues and approaches to solutions are discussed within the context of the Correctional Law Review, and in view of the unique legal status that native people have in Canada.

PART I: THE NATIVE OFFENDER

Native offenders are an especially disadvantaged group in Canada. They are over-represented in the correctional system, and their proportion seems to be increasing. They have special problems and needs, stemming from their unique social, cultural and spiritual backgrounds. Native offenders are reluctant to participate in programs run by non-Natives, but there is increased participation in programs that have Native orientation and are run by Natives. Natives also do not benefit from release programs to the same extent as non-Natives. Problems are also created by low Native representation in the correctional service staff, despite efforts at affirmative action, and low representation on the National Parole Board.

PART II: THE LEGAL FRAMEWORK

Aboriginal people have a special and unique legal status in Canada. It is a product of aboriginal and treaty rights, and various constitutional and legislative provisions. Insofar as aboriginal persons are members of ethnic, religious or linguistic minorities, Canada also has international legal obligations to respect specified rights. The legal definition of the rights of aboriginal peoples is imprecise. However, the development of aboriginal self-government is the major issue now facing aboriginal peoples and the government of Canada, as new institutions run by aboriginal peoples begin to assume greater control over critical areas of community life, including justice, law enforcement and correctional matters.

PART III: THE AMELIORATION OF CONDITIONS FOR NATIVE OFFENDERS

During the consultations on the Correctional Law Review the major questions for consideration will be whether legislative change would be helpful in ameliorating the conditions for Native offenders. Would either or both of the following two approaches be appropriate?

1(3) Through the development of special legislative provisions for Native people to assume greater control over the provision of certain correctional services to Native people.

In enabling legislation, a significant degree of jurisdiction could be transferred to aboriginal communities or other organizations under a clearly stated legal relationship with the Solicitor General. Correctional services, parole and aftercare services could be provided in facilities operated by Aboriginal correctional authorities. Services provided would still have to meet the basic requirements of the law, and provide adequate containment of offenders.

2(3) The second approach would be to ameliorate the situation of Natives in correctional institutions through amendments to existing correctional legislation governing all offenders. This is a more limited approach, and entails no fundamentally new arrangements. Control would remain with the existing correctional system.

Under this scheme there would be:

- significant consultation with aboriginal authorities, through regional and national Aboriginal advisory committees.
- guarantees for native spirituality, culture and rehabilitation.
- greater aboriginal community involvement in release planning for Native offenders.
- increased efforts at affirmative action in hiring and promotion of Native staff, together with increased awareness training for correctional staff.

PART IV: CONCLUSION

The two approaches outlined in the paper are complementary, and could operate to improve the situation of incarcerated native offenders, while facilitating efforts of native communities and other native organizations to assume greater control of correctional services to Native offenders.

INTRODUCTION

The Correctional Law Review is an examination of federal correctional legislation through an in-depth analysis of the purposes of corrections and a determination of how the law should be cast to best reflect these purposes. The ultimate aim of the review is to develop legislation that accomplishes the following goals: i) establishes the correctional agencies in law and provides clear and specific authority for their functions and activities; ii) reflects the philosophy of Canadian corrections; and, iii) facilitates the attainment of correctional goals and objectives. Such a legislative scheme is intended to promote fair and effective decision-making, be clear and unambiguous, facilitate operations, give guidance to corrections staff, be internally consistent, promote the dignity and fair treatment of inmates and reflect the interests of staff and of all others affected by the correctional system. The interest of the public and correctional administration and staff, as well as offenders, must therefore be taken into account in developing a legislative scheme.[1]

Native offenders constitute a group warranting specific attention both because of the special legal status of Aboriginal peoples and because of the serious ongoing problem of their substantial overrepresentation in the correctional system and other manifestations of their situation as a traditionally disadvantaged group. This latter issue was recognized by the 1984 Carson Report.

> Natives constitute up to 30 percent of the inmate population in at least one region of the Service. Since 1960, the growth rate of the Native population in federal institutions has doubled that of the non-Native population. Moreover, relative to non-Natives, only a small proportion of Natives are approved for conditional release programs (eg. temporary absences or parole), and most are released in Mandatory Supervision. The recidivism rate for Natives also is higher than for non-Natives.[2]

This paper begins with an examination of the continuing problem facing Native people in corrections by reviewing, correctional processes as they relate to the Native offender and the larger Native community. Part II discusses the legal context which must be considered in developing correctional legislation pertaining to Native people. This discussion includes possible implications for corrections of aboriginal rights and Native self-government, the *Canadian Charter of Rights and Freedoms*, The *Constitution Act, 1982*, and international law. Part III discusses the advantages and disadvantages of codifying provisions affecting Natives, and examines a number of specific issues, including Native spirituality, Native culture, correctional programming, transfers, parole and aftercare, as well as staff recruitment and training.

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[1] *A Framework for the Correctional Law Review* (Ottawa: Solicitor General, 1986).

[2] *Report of the Advisory Committee to the Solicitor General on the Management of Correctional Institutions (Carson Report)* (Ottawa: Solicitor General, 1984) pp. 50-51.

PART I: THE NATIVE OFFENDER

In this part, the problems associated with Native offenders in the correctional system will be reviewed. Some of these are problems inherited by corrections from other parts of the criminal justice system or the larger socio-economic system. Others are problems inherent in corrections itself, and concerning which corrections may be able to effect some meaningful change.

The most obvious problem is the large number of Natives in the system, in proportion to the number of Natives in Canadian society as a whole. Ironically, although it is distressing to see such high proportions of Natives in the correctional system, their small numbers, taken in absolute terms, in turn inhibit the mounting of a serious effort to provide programming within the existing correctional systems which will be responsive to Natives' needs. Compounding this is the fact that Native Canadians are not a homogeneous group, with a single language and culture. They therefore do not have a single set of problems for the correctional system to address. Not only are there several distinct aboriginal languages in Canada (there are 16 aboriginal languages that are in widespread use out of a total of 53 distinct aboriginal languages in Canada[3]), but the problems are different for status and non-status Indian, on and off reserves, and between rural and urban areas.

In the latest reported census figures, Native peoples made up only 2% of the population of Canada.[4] However, according to official statistics – which reflect varying definitions of "Native" and are thought by many to underestimate the numbers of offenders who consider themselves Native – about 9.5% of the penitentiary population is Native including about 13% of the federal female inmate population.[5]

In the West and North, the proportional representation is more dramatic, and indeed, is increasing. In the Prairie region, for example, Natives make up about 5% of the total population. However, in 1980, the Native population was 27.6% of the total Prairie federal inmate population; in 1987, it was 32.3%. In 1980, the Pacific Region showed a Native inmate population of 9.4%; in 1987, it increased to 12.2%.

The Native inmate population in Quebec has remained relatively stable, increasing from .2% in 1980 to .5% in 1987. In the same period, however, the percentage of Native inmates in the Atlantic Region dropped from 4.3% in 1980 to 2.6% in 1987. Similarity, Ontario dropped from 5.0% in 1980 to 4.0% in 1987.[6]

These figures are cited not to suggest a racist bias of individual criminal justice decision-makers or even of the system as a whole, but in order to illustrate that Natives represent a sizable minority in corrections, and to suggest that the root causes of their over-representation may be deeply buried in a breakdown in social structures outside the criminal justice system. Whatever the causes, however, it is clear that the numbers raise very real questions within corrections about how best to handle the needs and problems presented by Native offenders.

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[3] Anastasia Shkilnyk, *Progress Report: Aboriginal Language Policy Development* (Ottawa, Secretary of State, 1986) p. 4.

[4] *Canada's Native Peoples* (Ottawa: Statistics Canada, 1984) Chart I.

[5] CSC, *Population Profile Report* (Ottawa: CSC, 1987).

[6] CSC, *Population Profile Report* (Ottawa: CSC, 1980).
CSC, *Population Profile Report* (Ottawa: CSC, 1987).

The social and economic situation of Native Canadians as compared to non-Native Canadians is discouraging. Generally, Native Canadians have a lower average level of education, have fewer marketable skills and have a higher rate of unemployment. The infant mortality rate for Indian children is twice the national rate, while life expectancy for those children who live past one year is more than ten years less than for non-Indian Canadians.

The rate of violent death among Indian people is more than 3 times the national average. The rate of suicide is nearly 3 times that of the total population of Canada, but in the 15-25 age range, the suicide rate is more than six times that of the total population in that age group.[7]

Studies also suggest that Native offenders, perhaps to an even greater extent than non-Native offenders, come from backgrounds characterized by a high degree of family instability and considerable contact with various types of institutions operated by social service and criminal justice agencies.[8] Native offenders show a high incidence of single-parent homes, family problems and foster home placements. The majority of Native offenders have long criminal records both as juveniles and as adults. Native offenders are also more likely to be admitted to correctional institutions for a violent offence than are non-Natives, although the reasons for this finding are difficult to trace clearly.[9] Alcohol abuse tends to be a serious problem for the majority of native offenders. Both the rate of alcohol abuse and the extent of individuals' abuse of alcohol are a greater problem for Native offenders than for non-Native offenders.

About half of the Native federal inmate population are status Indians, and of this group, about a third come from reserves. Generally speaking, most Native inmates now appear to come from urban areas, although still in considerably smaller proportions than do non-Native offenders. Where only some 15 years ago, 40% of the Native inmates in Stony Mountain Penitentiary were listed as having come from urban areas, the figure is now closer to 70%. Native offenders' rate of urban residence appears to be higher than for the Native population in Manitoba as a whole.[10]

Once the Native offender arrives in prison or penitentiary, further differences are observed. A substantial portion of Native inmates perceive themselves and are perceived by others as significantly different from their non-Native counterparts in terms of their attitudes, values, interests, identities and backgrounds.

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[7] DIAND, *An Overview of Registered Indian Conditions in Canada*, (Ottawa: DIAND, 1986)

[8] D. McCaskill, Patterns of Criminality and Correction among Native Offenders in Manitoba: A Longitudinal Analysis (Saskatoon: Correctional Service of Canada, 1985) pp. 9,10. L. Newby, Native People of Canada and the Federal Corrections System: Development of a National Policy - A Preliminary Issues Report (Ottawa: Correctional Services of Canada, 1981), pp. Appendix A, pp. 13 - 18.

[9] See L. Newby, *supra*, note 8, p. 32.

[10] See D. McCaskill, *supra*, note 8

Native inmates tend not to participate to any meaningful extent in general rehabilitation programs within penitentiaries. This seems to be true despite the significant enhancements made over the last few years in available programs and the expansion of services by Native organizations interested in providing corrections-related services and counselling. The native offender participation rate is, however, higher for Native-specific programs involving private sector representatives such as Native Brotherhoods and Sisterhoods, and educational and cultural programs such as the Sacred Circle. Perhaps because of the increased openness of the correctional system to Native spiritual and cultural representatives, which is at least in part due to representations from Native organizations, and perhaps also because of the cultural revitalization taking place within certain Native communities, there seems to be an increase in Native culture and spiritual awareness among Native inmates.

Many Native offenders have special social, cultural and spiritual needs. These include the observation of such traditional group ceremonies and rituals as pipe ceremonies and the sweat lodge. For Native offenders who have not had much prior contact with traditional culture and spirituality, the opportunity for important part of their incarceration experience. It can also provide a link to free Native communities.

A significant number of Natives serve their sentence in correctional institutions which are a considerable distance from their home communities. The problem is aggravated for female offenders, both Native and non-Native, because there is only one federal penitentiary in Canada for female offenders. The Correctional Service of Canada (CSC) attempts to alleviate these distance problems by using Exchange of Service Agreements, by which federal inmates may be placed in provincial prisons closer to home, and vice versa. However, distances remain a problem, particularly for offenders from northern and isolated areas, since the majority of provincial institutions are also in central locations. This has obvious effects on the maintenance of family and community ties.

Before CSC's transfer policy was changed to reflect the principle of keeping inmates as much as possible in their home regions, transfers exacerbated the problem of distance from an offender's home community. This in turn disrupted plans for the re-integration of offenders back into their families and peer communities. It was partly in order to respond to these types of re-integrative problems that the Carson Report recommended the establishment of more work camps and community correctional centres for Natives, and even the consideration of "separate medium-level security institutions designed for Native inmates, operated and managed by Native staff".[11] On this subject, Carson remarked that "we believe that staff-inmate relations will always remain somewhat strained in institutions run by non-Natives and populated by large numbers of Native inmates".

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[11] See *Carson Report*, *supra*, note 2, p. 51.

Consistent with these recommendations, 1988 should see the establishment of Native-run Community Correctional Centres in Alberta (Edmonton) and British Columbia (the lower mainland). These centres, to be run by Native community organizations, will offer life-skills programs, substance-abuse treatment, and culturally appropriate programs for native offendecs.[12] The Pacific and Prairie regions are also seeking additional space in provincial work camps for natives.[13]

Differences between Natives and non-Natives are also observed in the release system. Native offenders tend to waive their rights to a parole hearing more often than do non-Natives, choosing not to be considered for parole. Native inmates are more unfamiliar with parole regulations than their non-Native counterparts. Even where Native offenders come from reserves, the Native community often does not form part of the parole or other release plan, sometimes because the offender is unwelcome on the reserve or because there are more extensive supervision and rehabilitative resources located in urban areas, as compared to rural Native communities, or because the offender no longer feels linked to the reserve. Often the situation is caused by a complex set of interrelated factors.

In a six year study covering the period January 1, 1979 to December 31, 1985, in the Prairie Region of CSC, Native federal offenders had a slightly higher grant rate for unescorted temporary absences than did non-native offenders, but significantly fewer full paroles were granted to Natives (25.5% of Native applicants granted as opposed to 39.2% of non-Natives).[14] In Saskatchewan, however, these parole rate differences for federal offenders do not appear to hold true, and in fact Native federal offenders appear to receive parole more frequently than non-Natives. Following release, Natives have a higher rate of return to penitentiary, and are more likely to be revoked for "technical violations" than for new criminal convictions.[15]

Many people who work with Native offenders complain that the small numbers of Natives among National Parole Board members and staff contribute to a lack of understanding of Native offenders and a lack of parole plans which are suitable for Natives. Some Native representatives claim that parole criteria or the assessments made about individuals in preparation for parole hearings are inappropriate to Natives. It is also claimed that there is little input from Native communities into the parole preparation process and the development of an aftercare plan for Native offenders.

In response to these concerns, a Working Croup was established by the Solicitor General in March 1987, to examine the process that Native offenders go through from the time of admission to a federal penitentiary until warrant expiry. The Working Group On The Re-Integration of Aboriginal Offenders as Law-Abiding Citizens is looking at ways of improving the opportunities for Native offenders to re-integrate into society through appropriate penitentiary placement, relevant institutional programs, improved preparation for temporary absences, day parole and full parole, and through improved and innovative supervision. The Working Group is consulting provincial and territorial governments, aboriginal communities and other organizations actively involved in the re-integration of Native offenders into society.[16]

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[12] Discussion with Millard Beane, Native Corrections Branch, CSC (Ottawa, December 23, 1987).

[13] CSC, *Correctional Service Response and Report on Implementation of the Report of the Advisory Committee on the Management of Correctional Institutions* (Ottawa: CSC, 1986) p. 15.

[14] L.P. Meier, *Grants and Denials of Release by Race, By Type of Release and by program for the Prairie Region, From January 1, 1979 to December 31, 1985 For All Federal Offenders* (Ottawa: National Parole Board, May, 1986).

[15] Ibid.

Attempts to recruit and retain significant numbers of Native staff into the Correctional Service have had modest results. CSC has what amounts to an affirmative action program for the hiring of Native staff, but there is still a much lower proportion of Native staff than offenders at the local levels. Native staff who do work in the correctional setting often find themselves under pressure from both Native offenders on the one hand (who may put unrealistic demands on them because they are Native) and other staff. This pressure on Native staff often causes frustration and early departure from the Service.

OBSERVATIONS

Several common themes appear in key writings and reports about Natives in the correctional system.

First, it is very difficult for non-Native correctional workers to understand the social, cultural, spiritual and religious backgrounds of Native offenders and thus to understand the forces which affect many of them most strongly. The greater the lack of mutual understanding, the more compounded become the difficulties of running a correctional program.

Second, even where Native offenders make "model prisoners" in the sense that they cause little or no trouble in the institution, there has been a marked lack of success in persuading Native offenders to participate actively in programs of education and counselling provided for the general population. There appears to be a consensus among correctional authorities and aboriginal groups that a significant problem is that Native offenders appear to be largely unfamiliar with the workings of the correctional system. However, it does appear that Native offenders are most likely to participate in programs if they are run by Native organizations which are not identified as being a part of the system.

Third, there has been modest success at best in recruiting Natives to work in correctional settings, which is especially regrettable since Native offenders appear most likely to participate in regular CSC programs staffed by Natives and having a Native cultural orientation.

Fourth, the problem of Native criminality - like crime in the mainstream - is closely tied to the general socio-economic conditions experienced by Natives on and off reserves, and any solution to Native criminality must address these socio-economic conditions, which include unemployment, poverty, alcoholism and family breakdown. Nonetheless, the factors of violence, lengthy criminal record, alcohol abuse and lack of community ties are strongly associated with risk, and cannot be ignored when individual case management and release decisions are made.

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[16] CSC, *Working Croup on the Re-Integration of Aboriginal offenders, Progress Report to September 3, 1987* (Ottawa: CSC, September 1987) p. 1.

All these themes lead many Native and non-Native observers to conclude that Native offenders are an especially disadvantaged group, that Native people should be more closely involved in the planning and delivery of correctional services, and that in some cases special services and programs should be established by and for Native offenders, either on or off Native land bases.

At the same time it must always be born in mind that Native offenders are not a homogenous group and that the large numbers of Native offenders who come from urban areas and who do not have strong links to Bands or reserves require approaches which involve urban native organizations as well as Bands or Tribal Councils.

PART II: THE LEGAL CONTEXT

Natives in Canada have a unique legal status. This status is the product of their treaty and/or aboriginal rights, and provisions of various constitutional documents. These rights, together with certain provisions in international law, have important implications for Natives and their relations with the justice system. In this chapter we will describe these elements in the legal framework relating to Natives.

ABORIGINAL RIGHTS AND INDIAN SELF-GOVERNMENT

Constitutional jurisdiction to make laws concerning "Indians, and lands reserved for Indians" was given to the Parliament of Canada by section 91(24) of the *Constitution Act, 1867*. Many Native groups entered into treaties with representatives of the Crown in which they surrendered their claims to the land in return for reserves and other treaty rights.

More recently, certain rights of the aboriginal peoples of Canada were specifically included in the Constitution. The provisions related to these rights are contained in sections 25 and 35 of the *Constitution Act, 1982*. Section 25 states:

> 35(1) The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
> a) any rights or freedoms that may have been recognized by the Royal Proclamation of October 7, 1763; and
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

This section is important for any correctional legislation pertaining to Native people because it is probable that the "equality rights" section of the *Charter* (section 15), cannot be used to strike down any existing or other rights of Native people on the grounds that they discriminate against non-Natives. Thus, distinctions are likely not discriminatory if they flow from the rights of aboriginal peoples. In addition, as we discuss below at p.20, s.15(2) of the *Charter* permits ameliorative programs to remedy disadvantages faced by individuals or groups quite apart from matters related to the rights of aboriginal peoples.

An even more important development for native people was the constitutional entrenchment of existing aboriginal and treaty rights through the inclusion of section 35 in the *Constitution Act, 1982*[17]:

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[17] As amended by the *Constitution Amendment Proclamation, 1983*.

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this *Act*, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this *Act*, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

There continues to be a variety of interpretations as to what these "aboriginal rights" mean in practice. Native leaders argue that a wide range of specific rights are implied in the meaning of aboriginal rights. Precise legal definitions await future constitutional conferences and court decisions. However, in dealing with issues of land claim settlements and self-government, a revised Comprehensive Land Claims Policy was adopted by the Government of Canada in December 1986. Within the framework of the policy, the Government of Canada is prepared to address a range of issues, including the key issue of self-government.

> The federal government's policy approach to self-government is to acknowledge the desire expressed by communities to exercise greater control and authority over the management of their affairs... The objectives of the Government's policy on community self-government are based on the principles that local control and decision making must be substantially increased... In the context of the comprehensive claims policy, self-government is an issue that is tied closely to the expressed need of aboriginal peoples for continuing involvement in the management of land and resources as well as in the development of self-governing institutions that recognize their place in Canadian society.[18]

For many native political leaders, self-government is undoubtedly the most pressing issue facing Native people today. At its most fundamental level it concerns the survival of Native peoples as distinct groups in Canadian society. However, just as there is no agreement as to the exact nature of aboriginal rights, there is also no consensus as to what, in a specific sense, is entailed in Native self-government. At the same time there is no doubt that it is seen as a desirable goal by government and Native people alike. Much has been accomplished toward implementing this goal, including: four constitutional conferences involving the Prime Minister, the provincial Premiers and Native leaders; a study by a special parliamentary committee (the Penner Report[19]); a major land claims settlement which includes self-government – the *James Bay and Northern Quebec*

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[18] Department of Indian and Northern Affairs, *Comprehensive Claims Policy* (Ottawa, 1986) pp. 17,18.

[19] Parliament of Canada, *Indian Self-Government in Canada: Report of the Special Committee* (Prenner Report) (Ottawa, 1983).

Agreement[20] and the *North Eastern Quebec Agreement*[21]; amendments to the *Indian Act*[22] to grant increased powers to local Native communities; federal self-government legislation – the *Cree Naaskapi Act*[23] and the *Sechelt Indian Band Self-Government Act*[24]; and provincial legislation which allows Native people to provide certain social services in a manner that recognizes their culture, heritage and traditions.[25]

The movement towards Native self-government will have major implications for the Correctional Law Review because it can be anticipated that the criminal justice system, including corrections, will be a component of many comprehensive self-government negotiations.

Of course, there is immense variety among Native communities as to the priority they attach to criminal justice matters in their self-government negotiations, to say nothing of the differences in various Native groups' economic and other readiness to take over various functions. Criminal justice has been to date a much lower priority with Native organizations than issues such as education and health care. Within the criminal justice area itself, corrections has been a far lower priority than matters such as policing and court operations. The Federal Government is conscious of the differing perspectives and needs that aboriginal communities bring to the process of defining self-government.

At the 1987 First Ministers Conference on Aboriginal Constitutional Matters, the Federal Government stated that it recognized the right of aboriginal peoples to self-government, and was prepared to support proposals for self-government that:

- provide explicitly for a process of negotiation amongst aboriginal peoples and governments to define and implement that right; ...
- permit aboriginal control over matters that directly affect them, this right to be applicable to all aboriginal peoples.[26]

Implied as part of the self-governing arrangements would be the authority to deliver services and programs.

The approach taken by the Federal Government in the *Sechelt Indian Band Self Government Act*[27] was to allow that Native community to determine the details of specific powers it wishes to assume. The *Act* is essentially enabling legislation which establishes the Sechelt community as a legal entity with responsibility for writing its own Constitution. Its Constitution can, within the limits specified in the legislation, define the powers and procedures of the community government, which would in turn allow the community to make laws in relation to a variety of areas.

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[20] The *James Bay and Northern Quebec Agreement* (Ottawa: Signed November 11, 1975) Agreement between the Grand Council of the Crees of Quebec, The Northern Quebec Inuit Association, The Government of Canada, The Government of Quebec, The société d'énergie de la Baie James, The Société de développement de la Baie James, The Commission hydro-électrique de Québec.

[21] *North Eastern Quebec Agreement* (Ottawa: Signed January 31, 1978) Agreement between Naskapi Schererville Band, The Government of Quebec, The Government of Canada, James Bay Energy Corporation, The James Bay Development Corporation, Hydro-Quebec, The Grand Council of the Crees of Quebec and the Northern Quebec Inuit Association.

[22] *Indian Act*, R.S.C. c. I-6 (as amended).

[23] *The Cree and Haskapis (Of Quebec) Act*, S.C. 1983-84, c. 18.

[24] *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27.

[25] *Child and Family Services Act, 1984*, Statutes of Ontario, 1984, c. 55.

[26] *The Federal Approach to Aboriginal Constitutional Reform* (Ottawa: First Ministers Conference on Aboriginal Constitutional Matters, 1987) pp. 6,7.

[27] See *Sechelt Act*, *supra*, note 24.

While not going as far as the development of parallel institutions, the landmark *James Bay and Northern Quebec Agreement* between the federal government, the province of Quebec, and the Cree and Inuit of Northern Quebec, which was signed in 1975, provided for specialized correctional institutions, programs and services appropriately modified to meet the needs of Cree and Inuit offenders.[28] Sections 18 (Cree) and 20 (Inuit) set forth wide-ranging provisions related to the justice and correctional systems. With regard to corrections, section 18 provides for the following:

- detention facilities in the James Bay Territory;
- Cree staff where possible, and special training for Crees to permit them to be employed in correctional institutions and in probation, parole, rehabilitation and aftercare services;
- language rights upon arrest or detention;
- Crees sentenced to imprisonment could be detained in northern institutions, after consultation with the Cree local authority;
- care in northern facilities of incarcerated Crees who are or become mentally ill or seriously physically ill during their incarceration;
- special facilities for young Crees under the ages of 21 and 16;
- programs and services appropriate for Crees, in the Cree language, where possible; and
- the undertaking of studies for the revision of the sentencing and detention of Crees, taking into account their culture and way of life.

Section 12 of the *North Eastern Quebec Agreement* contains similar provisions governing services to the Naskapis. These *Agreements* thus recognize not only that specialized programs and services have to be developed, but also that Native staff are vital to the provision of appropriate services to Native offenders and that Native communities can also play a critical role.

Although few steps have as yet been taken to implement the kinds of facilities and services described in the *Agreement* (in large part because of the higher priority given to other aspects of the *Agreement*), there appears to be some impetus now to look at how the corrections part of the *Agreement* could be implemented. The *James Bay and Northern Quebec Agreement* Implementation Negotiation, (established June, 1986), under the auspices of DIAND, is trying to resolve outstanding issues and focus action on implementation by various federal departments.

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[28] See *James Bay and Northern Quebec Agreement, supra* note 20.

Legislative recognition of Native peoples' special situation is not confined to federal initiatives. In the area of child welfare, several provincial governments have enacted legislation which gives recognition to the principle that Native people should provide services to their own people in a way that reflects their culture, heritage and traditions. For example, in Ontario the *Child and Family Services Act, 1984*[29] contains several special provisions regarding Native people. The underlying approach is reflected in the Declaration of Principles, for example:

> (f) to recognize that Indian and Native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and Native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concepts of the extended family ...

The *Act* then details the ways in which native organizations can participate in or take over decisions affecting the provision of services to Indian and Native children. Some provisions of the *Child and Family Services Act, 1984* relevant to Native people are included in *Appendix B* of this paper as an example of the kind of approach which has been tried in this area. The provinces of Alberta, Manitoba, New Brunswick and Nova Scotia have similar provisions with regard to Native child welfare.

Several provincial governments have also developed policies relating to education and health care that more accurately reflect the needs and aspirations of aboriginal people.

The various legislative initiatives outlined above recognize the need to ameliorate the situation of Natives through the provision of programs and services which reflect Native culture, heritage and traditions, and take the approach that such programs and services ideally should be provided by Natives, or at least with the involvement and advice of Native organizations.

While a great deal of attention has been directed toward status Indians living on reserves, much of the legislation pertains to Native people generally. Section 35 of the *Constitution Act, 1982*, states that the aboriginal peoples of Canada include the " … Indian, Inuit and Metis people of Canada". Similarly, the *Ontario Child and Family Services Act, 1984*, is clear in stipulating that "... band and Native communities" is to be interpreted as including status, non-status and Metis people.

Clearly corrections initiatives designed to promote the re-integration of Native offenders must include all those of Native heritage, whether or not they are status Indian, Inuit or Metis, on or off reserves, from urban or rural areas.

As the previous discussion has demonstrated, there has been a growing recognition of the shortcomings of a system which uses the institutions of the dominant society with an expectation that Natives will benefit from them in the same ways as non-Natives. Both governments and Native people have agreed upon the need to work toward a new relationship, even if most of the specifics of this relationship have yet to be worked out. New institutional arrangements and programs that are based on Native values, culture and traditions may all be appropriate and important.

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[29] *Child and Family Services Act, supra* note 25.

For some Native groups the assumption of power under some form of self-government based on traditional culture could simply be a continuation of what has been occurring all along. Others will develop new forms of government.

The Community Negotiations Branch of DIAND has funded many Native groups to carry out research to help them determine the most appropriate means of blending traditional institutional forms and customs with the contemporary situation. For some this will entail legislative schemes leading to the development of new institutions and programs. For example, a reserve in Manitoba is currently working on a plan to change its form of government from the band council system to a system based on traditional Native clans. Others will be content to make changes to the existing band council system.

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The *Canadian Charter of Rights and Freedoms* has special significance in any discussion of a legal framework for correctional legislation. As a constitutional document, the *Charter* binds both the federal and provincial governments by guaranteeing fundamental rights to everyone. The *Charter* protects these rights from the powers of the state.

With the advent of the *Charter*, the courts have been given expanded power to decide on the constitutionality of legislation and the actions of state officials that may affect constitutionally protected rights and freedoms.

In section 15, the *Charter* offers new constitutional equality rights protections for minorities, including Native persons.

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or mental or physical disability.

The adoption of this equality rights provision creates a new situation whereby policy issues related to equality rights which were formerly resolved through political processes have taken on a new constitutional dimension and are now potentially subject to judicial scrutiny. The previous part of this paper discussed some of the implications of Natives' unique legal status and the drive towards self-government. It remains to examine the legal implications for Native offenders of section 15.

Under section 15, an individual may challenge a policy or program (or absence of a policy or program) as violating the right to equality before and under the law, or to equal benefit and protection of the law. Most government programs are of course authorized by some form of law whether a statute or regulation, if only through the general authority of a department or agency. How section 15 will in fact be interpreted by the Supreme Court of Canada is as yet largely unknown, but arguments that unequal application of a program for which the law provides constitutes a denial of "equal benefit of the law" can be expected.

Even where a law or program is apparently neutral on its face, it may have a different impact on some minority groups than on the mainstream.[30] For example, it could be argued that the National Parole Board, carrying out its responsibilities "... to grant release, and determine release terms and conditions" under the *Parole Act*, would be in violation of the *Charter* if decisions, procedures and conditions of parole could be demonstrated to de facto discriminate against Native inmates. In such a case the inmate would likely have to demonstrate that there is a differential treatment, not justified by valid government objectives (such as protection of the public) between Native parole applicants and non-Native parole applicants and that the distinction has the effect of denying the "protection" or "benefit" afforded to non-Natives or that there is a lack of sameness (equality) between what is afforded Native applicants and non-Native applicants. It would be argued that although the legislation does not single out Natives, the effect of the procedures is discriminatory.

This kind of discrimination is "systemic discrimination", or the adverse impact of an apparently neutral law or program. As a 1985 federal Department of Justice discussion paper states, "it is discrimination when neutral administration and law have the effect of disadvantaging people already in need of protection under section 15." ... [T]his form of discrimination is often not readily identified; it commonly takes statistical analysis to detect it."[31]

The parole release power is a good example of an obvious "benefit" created specifically in law to which no discrimination should attach. Perhaps a more complex question is posed by programs like inmate employment. Can it be argued by a Native inmate that the training and work offered to inmates is designed for and more beneficial to non-Natives than to Natives, and thus constitutes "systemic discrimination"? And should correctional legislation be developed which includes provision for special programs, plans, criteria or even institutions for Native offenders to prevent future discrimination?

The issue of "systemic discrimination" raises the question whether, under the *Charter*, the courts can impose obligations not just to redress imbalances or inequalities in legislative provisions and programs, but also to legislate in a positive way. Can a challenge under the *Charter* result in a court's finding that the government must pass legislation or provide programs to redress these imbalances?

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[30] A. Nevitte and A. Kornberg, *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985) p. 42.

[31] Canada, Department of Justice, *Equality Laws in Federal Law: A Discussion Paper* (Ottawa: 1986) p. 9.

It is still unclear how far the courts might go. Several forms of positive remedies (mandatory orders) are available to the courts which pertain to minority groups: orders to provide employment or a denied service to a victim of discrimination, to provide educational or government services to members of a minority group, or to carry out an affirmative action program for the benefit of a disadvantaged group.[32] Section 24 of the *Charter* is expansive in the extensive remedial powers it bestows on the courts. It states that "anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

In order to preclude, or at least minimize, litigation alleging "systemic discrimination" against particular groups, governments may institute affirmative action programs in the form of special treatment or consideration for members of disadvantaged minorities. It is such legislation and programs that are referred to in section 15(2) of the *Charter*: Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". The purpose of an affirmative action program is the achievement of a more proportional representation, or more equal treatment, of groups than currently exists, in the workplace and elsewhere.

Since equality of results - not just equality of opportunity - is the main concern of affirmative action programs, such programs must include both "equal opportunity" and "remedial" measures. Equality of opportunity alone is not enough because the differences and disadvantages of certain groups would lead to a continuance of discrimination against those groups. Equality of opportunity alone can perpetuate the effects of past injustice. A remedial program, therefore, is required to make affirmative action effective. In the workplace, this usually entails the establishment of numerical goals or targets and timetables for achieving them.

Affirmative action programs have become a common vehicle for redressing past discrimination and are usually voluntary. In certain circumstances, however, the establishment of such a program can be imposed by federal or provincial Human Rights Commissions. For example, section 41 of the *Canadian Human Rights Act, 1983* states:

> a) that such persons cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures including:
>
> i) adoption of a special program, plan or arrangement referred to in subsection 15(l) (i.e. an affirmative action program).

In the recent decision of the Supreme Court of Canada in *Action Travail des Femmes and the Human Rights Commission v. Canadian National Railway Company*, it was held that a tribunal under s. 41(2)(a) of the *Canadian Human Rights Act* can impose a prescribed employment equity program with specified quotas on an employer.[33]

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[32] See Nevitt and Kornberg, *supra*, note 31, at p. 39.

Affirmative action programs for the hiring of Native people in the justice and correctional system are anticipated in sections 18 and 20 of the James Bay Agreement. For example, Cree and Inuit are to be employed in a variety of capacities:

> 18.0.34
> After consultation with the Cree local authorities or Cree Regional Authority, and when it will be appropriate to do so, Crees will be recruited, trained and hired in order to assume the greatest possible number of positions in connection with the administration of justice in the "judicial district of Abitibi".[34]

Similar programs have been instituted through policy in many federal and provincial correctional agencies. It can be anticipated that there will be increased demand for affirmative action programs as a means to ensure the adequate participation of Native people in the criminal justice system under both the *Charter* and human rights legislation. However a recent unreported case of the Manitoba Court of Queen's Bench suggests that in order to be protected by s.15(2), an affirmative action program must be rationally related to the cause of the disadvantaged state of the target group, and must be reasonable required in order to ameliorate the conditions of hardship of the group.[35] Not all programs, therefore, may be *Charter* protected.

INTERNATIONAL LAW

The final aspect of the legal context which requires consideration in developing correctional legislation is the variety of international obligations Canada has undertaken. These include the *UN Charter*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and its *Optional Protocol*, the *International Covenant on the Elimination of All Forms of Racial Discrimination*, and the *International Covenant on Economic, Social and Cultural Rights*. Canada has also endorsed the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.

Article 27 of the *International Covenant on Civil and Political Rights* specifically addresses the rights of members of minorities within states where they exist:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[36]

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[33] *Action Travail de Femmes and the Canadian Human Rights Commission v. Canadian National Railways* (Supreme Court of Canada, June 25, 1987).

[34] See *James Bay Agreement, supra*, note 20.

[35] *Apsit v. The Manitoba Human Rights Commission* (Noy 16, 1987, an unreported decision of the Manitoba Court of Queen's Bench.)

[36] *International Covenant on Civil and Political Rights* (1966), Article 27.

The *Covenants* are international treaties which are binding in international law, although they are not enforceable in domestic courts unless they are incorporated in domestic law. The UN Human Rights Committee receives information by way of regular reports from state parties under both *Covenants*, and by complaints from individuals under the *International Covenant on Civil and Political Rights*. A finding that a state has failed to observe the *Covenants* can result in censure by the Committee. The observation of covenants thus depends in large measure on the impact of international and domestic public opinion.

The provisions of the *Covenants* have not been directly incorporated into Canadian domestic legislation, and thus Canadians cannot resort to domestic courts to enforce compliance. However, the *Canadian Charter of Rights and Freedoms* specifically protects many of the human rights recognized in these documents. Furthermore, there is judicial authority to the effect that where legislation is ambiguous, it should not be given an interpretation that is inconsistent with Canada's international obligations.

In addition, the existence of international obligations such as those in the UN *Covenants* may often provide political support for arguments on behalf of minority groups.

An increasing number of Native groups are utilizing international law to support their efforts to gain control over their affairs through the formation of several international Native groups including the World Council of Indigenous People, the International Indian Treaty Council and the Inuit Circumpolar Conference.

PART III: AMELIORATION OF CONDITIONS OF NATIVE OFFENDERS

We have suggested that the high number of Native people coming into conflict with the law remains a serious problem for the correctional system and that programs designed to ameliorate the problem have, to a large extent, failed to achieve the desired results. As we noted earlier, Native offenders are not a homogeneous group linguistically, culturally or tribally. Native offenders thus have unique and various needs that require special measures to meet them.

In addition, the discussion has indicated that Native people in Canada are entering a new era in the history of their relations with the larger society. This is manifest in the development of two related legal and political issues: the movement toward Native people assuming more control over their own affairs through self-government, and their increased demands for their aboriginal and treaty rights, as well as any rights under the *Charter* and human rights legislation. These issues are, in turn, closely tied to the major cultural revitalization that is presently occurring in many Native communities across Canada. It can be anticipated that these movements will continue to gain momentum in the future.

Each of these developments has important implications for the future administration of the correctional system. The Correctional Law Review (CLR) provides an opportunity to address at least some of the problems related to Native offenders and the correctional system. The CLR is of course concerned with correctional legislation and regulation, and not with operations. It is therefore limited in the types of solutions it can offer. The key question is: how much of the body of correctional rules, procedure, criteria and authority should be set out in law as opposed to a strategy of policy and operational improvements in programs and services?

A NOTE ABOUT CODIFICATION AND THE CLR

One of the fundamental premises of the CLR, and indeed the Criminal Law Review as a whole, is that the present correctional legislation is in need of revision because it "... is outdated, confusing, and often inadequately related to current realities".[37] Our second Working Paper, *A Framework for the Correctional Law Review*, suggests that it is important for correctional legislation to take into account recent developments in the law and the wider justice system, particularly the *Charter*, which have an impact on corrections. The impact of the *Charter* "... may require fundamental restructuring of the legislative scheme and a reorientation of its substance to be consistent with *Charter* demands".[38]

In addition, we suggested in the first Working Paper on *Correctional Philosophy* that a clear statement of correctional purpose and principles is necessary to form the basis of any revised correctional legislation (see *Appendix C*). In carrying out the task of revising the legislation, the interests of the correctional staff, inmates and the public must be considered and the resulting legislative scheme must be seen as fair by all people affected.

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[37] *A Framework for the Correctional Law Review*, *supra*, note 1, p. 19.

[38] *Ibid.*, p. 22.

Appendix C contains the full statement of purpose and principles proposed by the Review. Of particular relevance are strategies c), d) and e), which emphasize the rehabilitation of the offender through the provision of a wide range of program opportunities responsive to their individual needs", and principle I which suggests that "... Individuals under sentence retain all the rights and privileges of a member of society except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law." In addition, principle 7 speaks to the need to involve the larger Native community in the correctional system. "Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services."

In the *Framework* Paper, it was suggested that correctional legislation should be sufficiently detailed to provide clear guidance with respect to correctional goals and objectives, and a structured framework for decision-making, while permitting sufficient flexibility for appropriate decisions by correctional staff.

The approach recommended in the Framework paper entails legislating the purpose and principles of corrections, the objectives of all major agency functions and activities and essential requirements but leaving the details to the initiative of those who must account for the functioning of the system. In this approach all elements of the legislation, including regulation, must be framed to be consistent with the stated purposes and principles. Specific policies will be developed by the correctional agencies themselves to reflect the philosophy.[39]

Given the Correctional Law Review's approach, a number of questions arise with regard to the situation of Native offenders and the Native community: Is the development of special legislative provisions for Native people an effective approach to the amelioration of the serious problems of the Native offender? With regard to such legislation, what specific approaches should be considered? What matters affecting the Native offender, as a special offender group, should be included in legislation and which should be set out in policy? What are the legislative implications for the Native offender of the purpose and principles of corrections?

It would appear that two broad issues must be addressed by the Correctional Law Review in its attempts to respond to the unique situation of the Native offender: (1) the extent to which legislative provisions can facilitate the assumption by Native communities of control over correctional services to Native offenders, and (2) the recognition of the unique needs of those Natives who do find themselves in the correctional system.

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[39] *Ibid.*, p. 48.

These approaches are not intended to be mutually exclusive but rather could co-exist and, in the case of initiatives giving Native communities or organizations more control over corrections, would be viewed as options for the Correctional Service and Native organizations and communities to discuss. In these negotiations, it is important to be cognizant of the immense variety of circumstances among Native communities in terms of their readiness and willingness to assume control of their affairs. Any changes should be compatible with the enhancement of aboriginal community decision-making, and involve appropriate consultations with aboriginal people. Recognizing that increasing numbers of Native offenders come from urban areas, it is particularly important that urban aboriginal organizations be included in the process of consultations. This implies that different legislative approaches will be appropriate to meet the diverse interests of Native offenders. In addition, any change in programs, policy and law affecting aboriginal people must not diminish treaty and aboriginal rights.

The CLR takes a two track approach to the problem. One is to encourage the creation of a new approach, in law and in policy, that incorporates aboriginal participation in and possibly control over correctional issues affecting aboriginal people, and to systematically involve aboriginal organizations in this process from the outset. The other is to improve the current system by putting specific protection in law with respect to important aspects of correctional programming vis-à-vis aboriginal inmates.

ENABLING LEGISLATION

This approach is the most far reaching in the sense that it entails a fundamental shift in the correctional system's legislative position. It would involve the inclusion in correctional or other legislation of measures to enable Native people to assume control of certain correctional processes that affect them.

Consistent with Federal Government policy discussed above at pp. 12-14, which supports approaches which permit greater aboriginal control over matters which directly affect them, it would be possible to transfer jurisdiction for providing at least some correctional services to Native groups under a stated legal relationship with the Solicitor General. One of the major issues for consultation is whether this type of legislation would be appropriate, and if so, what form it should take.

This paper has discussed the large number of different Native communities, and noted that many incarcerated Native offenders do not have strong connections with a particular Native community. If enabling legislation is developed, it will be important to frame it in sufficiently flexible terms to allow a wide variety of Native organizations or communities to participate in the provision of correctional services. An important question is how best to recognize the diversity of Native communities and communities and groups.
The services provided could range from the establishment of correctional institutions to the running of parole and aftercare facilities or other culturally appropriate services. The legislation will presumably need to be open-ended enough to take into account a wide

variety of correctional arrangements which might result from the negotiations. In an effort to develop a culturally-based system or systems, Native groups may propose correctional facilities or services which are very different from existing structures.

It is true that most, if not all, of the correctional services and programs authorized under the proposed legislation could be implemented under the present legislative scheme through contracts with native organizations. However, while such enabling legislation may not be strictly necessary, it would nonetheless demonstrate a clear Government endorsement of the role of aboriginal organizations in the delivery of correctional services in the context of a new legislative framework for federal corrections. They would then be in a position to enter into negotiations with correctional authorities within an explicit legislative framework, and continuation of funding arrangements will not depend on government policies on privatization, or general voluntary sector involvement. This would have the effect of putting aboriginal groups in a stronger position to negotiate programs if they can point to specific supporting legislation.

Clearly there would have to be provision for adequate compensation to be paid to the Aboriginal correctional authority. However issues for consultation include whether agreements to transfer an aboriginal offender to an Aboriginal correctional authority should contain the consent of; a) the offender; b) the Aboriginal correctional authority; and c) the CSC. Should agreements also make reference to the conditions upon which the federal government would accept an aboriginal offender back into the federal correctional system, if such offender wishes to transfer from the custody of the Aboriginal correctional authority?

To some extent, of course, the Correctional Service of Canada already enters into arrangements of the sort contemplated by this kind of legislation. CSC contracts with various Native groups for the provision of halfway houses, parole supervision, and other services required by Native offenders, although to date most of these arrangements have occurred in urban areas. A good example of a native organization currently engaged in providing correctional services for Native offenders is the Native Counselling Services of Alberta (NCSA). Formed in 1970, and with 130 employees, NCSA offers programs in Family, Criminal and Young Offender Court work. As well, NCSA operates a minimum security camp, a young offenders group home, a community residential centre, parole and probation supervision (for adult and young offenders), Native Awareness Program, a family living skills program, a training department, a legal education-media department, and a research department. The NCSA also operates a fine options program and a community service order program. Funding is provided by the provincial and federal governments.[40] Of note is the fact that NCSA is an urban-based Native organization which provides corrections services to Native offenders from a variety of backgrounds.

The principal difference flowing from enabling legislation would be that while the current arrangements are created as a matter of policy through contracts, the new arrangements discussed here would be recognized in law and formalized through the designation of certain organizations and correctional authorities as providers of Native correctional services. This would give Native communities a clear legal basis from which to negotiate changes in the way services are delivered to Native offenders, and would give a greater measure of security to the Native organizations providing the services.

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[40] Native Counselling Services of Alberta, *Alternatives to Imprisonment for Natives, A Submission To the Correctional Law Review* (Edmonton: April 22, 1987) pp. 1,2.

A key issue for consultation is the extent to which agreements made between the Aboriginal correctional authorities and the CSC for transferring offenders should contain detailed specification of the programs and services to be delivered, as well as the appropriate standard of services. Flowing from this, to what extent should the government assure itself on a regular basis that the services provided in this way meet certain basic requirements, such as the protection of the rights of the offenders involved, and other minimum standards, as well as the provision of adequate containment for offenders who are being cared for off reserves, in the larger community.

Due to the large number of issues of this type, it might be also helpful to include provision for regular consultation between the Government and Native communities on the subject of these services.

As we noted earlier, placing these sorts of provisions in correctional legislation would not preclude the negotiation of broader self-government initiatives by Natives groups and the federal government. What this approach would allow is the transfer of suitable correctional authorities to Native communities in the absence of a more comprehensive agreement.

It is also worth mentioning that such arrangements could in many cases involve federal, provincial and Aboriginal authorities in a given area.

> **Should federal correctional or other legislation include enabling provisions which would provide explicit authority for Native communities or organizations to assume control of certain correctional processes that affect them? What should these provisions contain?**

REFORM OF EXISTING CORRECTIONAL LEGISLATION

This approach represents a more limited attempt to ameliorate the problems of the Native offender than the previous proposals in that no fundamentally new arrangements are envisioned and the focus of control remains with the existing correctional system. It entails the development of a legislative scheme which recognizes the unique status of Natives as well as Native offenders as a particularly disadvantaged offender group and therefore deserving of particular consideration for the reasons discussed earlier in this paper. The intent of this approach is twofold: (1) the codification of selected aspects of the operation of the correctional system as they pertain to Native offenders, that is, to specifically protect such things as native spirituality, and (2) the formal encouragement of greater involvement of the Native community and Native institutions in the correctional system. Details as to the components of corrections which might be included in the legislation are discussed below.

Codification of certain Native offenders' concerns accomplishes two central goals of the Correctional Law Review. First, the legislative scheme suggested would be consistent with the purpose and principles of corrections as set forth in Part I, and would permit Native offenders to enforce the provision in the courts if necessary, something they are not able to do if the protection remains only in policy. Second, the proposed approach to codification would ensure that correctional legislation is in line with *Charter* requirements as well as Canada's obligations under international law.

VALUE OF SPECIFIC PROVISIONS IN CORRECTIONAL LEGISLATION WITH RESPECT TO ABORIGINAL OFFENDERS

The unique status of Canada's aboriginal peoples, and their acute problems once they arrive in correctional care suggests that there is merit in statutory entrenchment of appropriate protections.

Legislation in this area would clearly demonstrate the government's concern to improve the situation of aboriginal people in corrections. Parliamentary approval in the form of legislation will be a solid guarantee of the implementation and survival of what is a significant policy development. Grounding aboriginal corrections policy in legislation gives such policy greater authority, and provides explicit protection for specific entitlements such as religious freedom.

A) CONSULTATION WITH NATIVE AUTHORITIES

Several provincial precedents for this approach to legislation affecting Native people currently exist, as we have seen, in the areas of child welfare, family services, social welfare, health care and education. These initiatives have been implemented largely because the generalized policy and program approach has failed to adequately address Native people's needs in these areas. They are intended to give Native people a greater role in providing services to their own people. There has been a recognition that, despite numerous attempts to develop special programs and involve Native people in their delivery, the situation has not improved significantly and a new approach is required. The enactment of provisions in law which required agencies to provide specific services and to involve native people in the process has been determined by many provincial governments to be the most appropriate approach.

Even where Indian and Native communities do not take over correctional services entirely, they, together with aboriginal advisory bodies with experience and expertise on aboriginal customs and/or offenders can and should advise governments as to the kinds of programs and services which are appropriate for aboriginal offenders, and how these might best be delivered. In the correctional context, both CSC and NPB have, as a matter of policy, established National Native advisory committees, and CSC Prairie Region has established a regional committee. These committees advise on Native correctional policy and programs. This approach could be expanded to all regions, and even to the local institutional level.

The question for the Correctional Law Review is whether or not this approach should be mandated in legislation. Although the composition of the Committee would not be detailed in legislation, it will be important to comment on the appropriate membership for such committees, for example, service providers, political organizations and community organizations.

Should correctional law provide for a requirement like the following?

1 **The Correctional Service of Canada shall regularly consult with Aboriginal communities and with recognized aboriginal advisory bodies with experience and expertise on aboriginal customs and offenders, about the provision of programs and services to aboriginal offenders, by**

   a) **establishing an Aboriginal advisory committee to provide advice on national policy issues relating to Aboriginal offenders;**

   b) **where requested by an Aboriginal community or recognized aboriginal advisory body, establishing a Regional Aboriginal Advisory Committee to provide advice on regional policy issues relating to aboriginal offenders. Regional Aboriginal Advisory Committees will form part of an overall National Aboriginal Advisory Committee;**

   c) **where requested by an Aboriginal community or recognized Aboriginal advisory body, and where practical, establishing an Aboriginal Advisory Committee to provide advice to a particular institution or parole office about programs and services for Aboriginal offenders; and**

   d) **the Aboriginal Advisory Committee would provide advice, upon request, to other jurisdictions.**

At the local level, this provision would entitle bands, Native communities and urban-based experts on Aboriginal matters to play a strong advisory role in respect of institutions located nearby. For a variety for reasons, however, including the isolated location of many penitentiaries, and the fact that many federal inmates are incarcerated far from their home communities, it is important also to have a national advisory committee which can provide policy advice on Native programming generally.

An alternative to, or possibly in addition to, the national committee would be regional committees. Such committees would be able to respond more directly to regional differences among native communities, although some coordination at the national level might still be desirable. Should legislation provide for regional committees as well as a national committee?

B) PROGRAMS OF NATIVE SPIRITUALITY, CULTURE AND REHABILITATION

The Correctional Law Review's statement of purpose and principles covers, in a general way, the need for "encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs" (see *Appendix C*). To the extent that this principle will ensure the provision of programs to meet the needs of all offenders, therefore, Native-related programming will be assured.

Two questions are raised by this issue, however: first, should there be a special guarantee in law respecting Native-related programs; and second, how clearly can Natives' unique needs be defined, in law or in fact?

It is clear that many Natives have special needs surrounding Native spirituality and the observance of ceremonies, and many Native offenders give positive reports of the Native Elder programs in CSC and other institutions. Beyond spiritual and related cultural needs, however, the unique program needs of Natives are not well understood or documented by correctional systems. It appears that across the country, Native and non-Native offenders could benefit from educational, vocational and alcohol programs, as well as programs designed to improve social skills. Whether Native inmates should be receiving more of the same type of programming given to non-Native inmates - but perhaps with Native staff running the programs - or require a different type of correctional program or experience, is not well understood, at least by traditional correctional systems.

Since the federal correctional system is already committed to providing suitable programming for Natives, there would appear to be no conflict in principle with a statutory guarantee of Native programming. One practical question which arises, however, is in what circumstances the guarantee would operate. Should the sole Native inmate in a penitentiary receive the full range of Native-related programs which would be offered in, for example, a Prairie institution like Stony Mountain Penitentiary?

One approach to this question would be to rely on the general guarantees for all inmates which have been proposed in the *Correctional Philosophy* and *Correctional Authority and Inmate Rights* Papers.[41]

This approach could be criticized as not providing sufficient guidance as to Native offender program needs. The general objective, for example, of providing "programs responsive to individual needs" may not necessarily lead to programs which take into account the various Native attitudes, traditions and orientation. It has been suggested that, to be effective, correctional programs for Natives must in fact adopt such an orientation, even if their ultimate practical aims are to teach job skills, reduce alcoholism, or achieve any of the other objectives which are pertinent to the inmate population as a whole. Similarly, since complaints continue to arise about the recognition of Native spirituality as a religion, and about the particulars of Native spiritual observance, some critics would support special guarantees.

Should correctional law supplement general guarantees with particular references to Native program needs, such as the following?

2 **The correctional system shall make available programs which are particularly suited to serving the spiritual and cultural needs of Aboriginal offenders and, where numbers warrant, programs for the treatment, training and reintegration of Aboriginal offenders which take into account their culture and way of life.**

3 **Aboriginal spirituality shall be accorded the same status, protection and privileges as other religions. Native Elders, spiritual advisors and ceremonial leaders shall be recognized as having the same status, protection and privileges as religious officials of other religions, for the purposes of providing religious counselling, performing spiritual ceremonies and other related duties.**

4 **Where numbers warrant, correctional institutions shall provide an Aboriginal Elder with the same status, protection and privileges as an institutional Chaplain.**

5 **The correctional service shall recognize the spiritual rights of individual Aboriginal offenders, such as group spiritual and cultural ceremonies and rituals, including pipe ceremonies, religious fasting, sweat lodge ceremonies, potlaches, and the burning of sweetgrass, sage and cedar.**

This wording would acknowledge both that the freedom to practice one's religion is protected in the Canadian constitution, and the special place of spiritual and cultural values in native traditions. The proposed wording would require that Natives be given access to spiritual and cultural programs, regardless of their numbers in the population. This is in conformity with existing Correctional Service of Canada policy. The Service established a Commissioner's Directive on Native Offender Programs and prepared a "Native Spirituality Information Kit" to acquaint correctional staff with elements of Native spiritual practice. The CSC policy " ...accords Native religion status and protection equal to that of other religions. It extends to Native individuals under its supervision, those opportunities necessary to practice religious freedom which are consistent with the prudent requirements of facility security. This shall include access to appropriate space and materials, Elders, spiritual advisors, publications and religious objects or symbols".[42] Natives in institutions occasionally report, however, that there are still problems with the recognition of Native spirituality as a religion. Placing the existing policy in law would enshrine these more specific guarantees, although not all of the detail proposed above need necessarily be included in legislation.

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[41] *Correctional Philosophy*, Working Paper Number 1 (Ottawa: Solicitor General, June, 1986). *Correctional Authority and Inmate Rights*, Working Paper Number 5 (Ottawa: Solicitor General, October, 1987).

The wording of this draft provision also mandates other special Native programming, where numbers warrant. This might include such things as special halfway houses exclusively for Natives, as recommended by the Carson Report. It might also include the creation of alcohol treatment programs which draw on Native spiritual concepts as part of the treatment approach, as suggested by the Native Sisterhood at the Prison for Women. The provision acknowledges without precisely defining these other unique needs or how to respond to them. The breadth of this language allows for analysis and negotiation of the needs and appropriate programs for Natives at the local level, where discussion of real needs is most likely to be informed and practical.

The draft wording would allow for these programs to be delivered by private Native groups and individuals (as spiritual ceremonies and teaching are now delivered in CSC institutions). The provision would not require correctional authorities to offer programs directly, but only to make them available. This would apply equally to all Natives.

C) TRANSFERS

It was seen earlier that another area of concern among Native offenders is transfers and the long distances from home often involved in serving a sentence of incarceration. We have seen that the Carson Report recommended a general policy of retaining inmates in their home region. This is now formal CSC policy.

Some Native experts have recommended that the institutional placement of Native offenders be specifically guaranteed in legislation in order to ensure their incarceration in the region in which they were sentenced, thereby facilitating the participation of the larger Native community in the correctional process.

The proposals made in *Correctional Authority and Inmate Rights* appear to encompass this concern, at least in part by circumscribing the criteria which may justify a transfer of any inmate and prescribing a procedure for involuntary transfers. A question for consultation is whether there are unique considerations in respect of transfer of Native offenders which need to be the subject of a special guarantee.

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[42] CSC, *Native Spirituality Information Kit* (Ottawa: CSC, 1985) pg. 12.

D) RELEASE

For Native offenders who come from reserves, a particular concern has been expressed about release planning and the degree to which releasing authorities are willing to consider paroling or releasing on mandatory supervision a status Indian offender to the reserve, perhaps under the supervision of status Indian community members. Some Native representatives claim that correctional and releasing authorities do not sufficiently consider the Native community's need for the offender's return to the community as a worker and family member, or the community's willingness to supervise the offender or otherwise play a vital part of the re-integration plan. Correctional authorities, by contrast, suggest that bands often do not really wish to accept an offender back, or that when they do, the community does not play the active role in his supervision or re-integration which is necessary to protect society and fulfill other criteria for parole.

It would appear that these arrangements can only be addressed on a local, specific level. However, it has been suggested that perhaps correctional law should require that bands and Native communities receive notice of a Native band member's parole application or mandatory supervision plan, with his or her consent and providing he or she has expressed an interest in returning to the reserve.

Perhaps such a provision might read as follows:

> 6 **With the offender's consent, and where he or she has expressed an interest in being released to his or her reserve, the correctional authority shall give adequate notice to the Aboriginal community of a band member's parole application or approaching date of release on mandatory supervision, and shall give the band the opportunity to present a plan for the return of the offender to the reserve, and his or her re-integration into the community.**

This provision would permit, without requiring, individuals, or organizations within a Native community to act as direct or indirect supervisors of a given offender's release. (Existing correctional law gives authorities the power to designate community groups or individuals to act as release supervisors). Arrangements for indigenous supervision on reserves, of a formal or informal nature, would be worked out at a local level. There are examples of such an approach: the Dakota-Ojibway Tribal Council, for example, has an arrangement with the provincial government whereby the band provides probation supervision for Native offenders on the reserve. The province contributed funds for the initial training of community members to act as probation Officers.

E) NATIVE CORRECTIONAL WORKERS AND NATIVE AWARENESS TRAINING

The Carson Report suggested, and many Native experts believe, that in order to be effective, correctional programs for Native offenders would have to be delivered by predominantly Native staff. The draft provisions set out earlier in this Part do not require Native staffing for Native programs, but do require that the programs offered be "suited to serving" Native needs or "take into account" their culture and way of life. If, as many believe, only a program delivered by Natives can be truly suited to Natives, then this wording may achieve that result indirectly.

This raises, however, another issue important in itself, which is the hiring of Native correctional staff by traditional correctional systems. It will be recalled that the *James Bay Agreement* contemplates both special programs for Native inmates and hiring programs for Native staff. CSC has in place an affirmative action program for the hiring of new staff members of Native origin. Known as the Action Plan, it was designed to increase the hiring of Native staff in the CSC, and has been in operation since 1985. Natives have been hired as correctional officers and parole officers, if they meet the basic requirements for the position. They are trained in the normal fashion, and must complete a two year probationary employment period, which is the entry level required of everyone. Competition for higher positions requires 3 - 4 years of experience in the entry level positions. As the Action Plan has only been in operation for 3 years, no Natives have yet advanced to higher positions.

However, it appears that they will be considered for higher positions as a result of their experience, and promoted in the usual way, as any qualified staff of CSC.

There still exist barriers to acceptance of aboriginal correctional workers due to cultural differences. In the past, the stigma of being aboriginal often led to a lack of acceptance on the part of other correctional staff. However, as their numbers grow, and through sensitization of other staff, there is a greater acceptance of aboriginal people. More Natives are staying, and this too adds to a greater acceptance of Natives in the service.

Education has proven to be a barrier to Native staff in competition for some positions. For parole officers, for example, CSC requires a B.A. in criminology. There are no programs offered to assist Natives in CSC to get such a degree, and they must therefore do it on their own. For some positions, however, (e.g. correctional officers), experience in the field of corrections or with juveniles could replace any specific educational requirements.[43]

While the Action Plan has had some success, it is still widely felt that more Native Staff Would be desirable for CSC, especially at local (penitentiary and district office) levels. Many Native leaders also feel the program should involve affirmative action in promotion as well as hiring, and in management positions.

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[43] Discussion with France-Marie Trepanier, Chief, Affirmative Action, Correctional Services of Canada (Ottawa, December 23, 1987).

The hiring and effective management of staff to meet the relevant needs of various offender groups (women, francophones, and Natives) runs through many aspects of corrections. For Natives, the arguments for Native offenders working primarily with Native staff are particularly compelling; they include not just spiritual and cultural bonds, but an understanding which it is claimed can be achieved only after long study by people from the cultural mainstream. Practically, as we saw earlier, Native inmates participate in correctional programs less actively than do non-Natives. Perhaps the participation rate in the same programs, run by Native staff, would be no better. There are good reasons for hiring Native staff to work with Native inmates, reasons which extend into the security and release areas. It should be made clear, however, that Native staff need not work exclusively with Native offenders. Employment mobility for trained Native staff is also important.

Provisions requiring affirmative action programs need not necessarily be included in legislation. The question for the CLR is whether, in light of the particular situation of Native offenders, a legislated requirement is appropriate, for example:

> **7 There shall be an affirmative action program for the hiring and promoting of aboriginal professional staff to work with aboriginal offenders.**

Recognizing, however, that there is difficulty in attracting Natives to correctional work, the correctional authority should give specific Native awareness training to all staff coming into contact with Native offenders.

It is recognized that such awareness training is not a panacea, but is essential so long as the number of Native staff at the penitentiary and district office level is insufficient, considering the numbers of Native offenders. CSC already holds, as a tenet of its corporate mission, that staff members recognize special needs of offenders. A special Commissioner's Directive was developed: "To ensure that the needs and constructive interests of native offenders are identified and that programs (including native spiritual practices) and services are developed and maintained to satisfy them."[44] Each region in CSC in fact now provides, proportional to the number of Native offenders in the region, Native awareness training on a regular basis for selected staff.

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[44] CSC, *Commissioner's Directive, Native Offender Programs* (Ottawa: CSC, January 1, 1987) Number 702.

PART IV: CONCLUSION

This paper has identified the major problems faced by Native offenders in the correctional system. Over-representation in the system and the lack of Native-oriented programming run by Native creates problems for both Native offenders and the corrections system.

The approaches outlined in this paper are made within the context of the Correctional Law Review, and in view of the unique legal status that aboriginal peoples have in Canada. These approaches are consistent with developments in aboriginal self-government, whereby aboriginal people will be able to assume control of essential elements in community life, which might include certain justice, law enforcement and correctional matters.

A two-pronged approach has been suggested as possible for the amelioration of the problems faced by Native offenders and the correctional system. At the base of each approach is that aboriginal people should be more closely involved in the planning and delivery of correctional services, and that any direction for change should include the development of special services oriented to the unique needs of Native offenders. The two approaches are compatible with each other and indeed are complementary. They could be pursued either separately or together.

The first approach is that special legislative provisions could turn over a significant degree of jurisdiction to aboriginal-run correctional organizations. Correctional services, parole and after-care services could be provided by Aboriginal correctional authorities within a clearly defined legal relationship with the Solicitor General.

The second approach would be to incorporate in existing correctional legislation proposals that specifically deal with Native needs in corrections. Under this scheme there would be increased native consultation through regional and national Aboriginal Advisory Committees. Programs specifically geared to Native cultural and spiritual needs would be guaranteed, and rehabilitation and release programs would be specially designed for Native people. Affirmative action in hiring and promotion of Native staff is essential to this approach, as is increased Native awareness training for all correctional staff.

APPENDIX "A"

LIST OF THE PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Correctional Issues Affecting Native Peoples

Federal-Provincial Issues in Corrections

Mental Health Services for Penitentiary Inmates

International Transfer of Offenders

APPENDIX "B"

CHILD AND FAMILY SERVICES ACT, 1984, Statutes of Ontario 1984, c. 55

Approvals and Funding

13(3) An approved agency that provides services to Indian or Native children and families shall have the prescribed number of band or Native community representatives on its board of directors in the prescribed manner and for the prescribed terms ...

Part X: Indian and Native Child and Family Services

192. The Minister may designate a community, with the consent of its representatives, as a Native community for the purposes of this *Act*.

193. The Minister may make agreements with bands and Native communities, and any other parties whom the bands or Native communities choose to involve, for the provision of services.

194(1) A band or Native community may designate a body as an Indian or Native child and family service authority.

(2) Where a band or Native community has designated an Indian or Native child and family service authority, the Minister, a) shall, at the band's or Native community's request, enter into negotiations for the provision of services by the child and family service authority; ...

195. Where a band or Native community declares that an Indian or Native child is being cared for under customary care, a society or agency may grant a subsidy to the person caring for the child.

196. A society that provides services or exercises power under this *Act* with respect to Indian or Native children shall regularly consult with their hands or Native communities about the provision of the services or the exercise of the powers and about matters affecting the children, including: a) the apprehension of children and the placement of children in residential care ...

APPENDIX "C"

STATEMENT OF PURPOSE AND PRINCIPLES OF CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of the wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime .

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

APPENDIX "D"

SUMMARY OF QUESTIONS AND RECOMMENDATIONS

Should federal correctional or other legislation include enabling provisions which would provide explicit authority for Native communities or organizations to assume control of certain correctional processes that affect them? What should these provisions contain?

1. The Correctional Service of Canada shall regularly consult with Aboriginal communities and with recognized aboriginal advisory bodies with experience and expertise on aboriginal customs and offenders, about the provision of programs and services to aboriginal offenders, by

    a) establishing an Aboriginal advisory committee to provide advice on national policy issues relating to Aboriginal offenders;

    b) where requested by an Aboriginal community or recognized aboriginal advisory body, establishing a Regional Aboriginal Advisory Committee to provide advice on regional policy issues relating to aboriginal offenders. Regional Aboriginal Advisory Committees will form part of an overall National Aboriginal Advisory Committee;

    c) where requested by an Aboriginal community or recognized Aboriginal advisory body, and where practical, establishing an Aboriginal Advisory Committee to provide advice to a particular institution or parole office about programs and services for Aboriginal offenders; and

    d) the Aboriginal Advisory Committee would provide advice, upon request, to other jurisdictions.

2. The correctional system shall make available programs which are particularly suited to serving the spiritual and cultural needs of Aboriginal offenders and, where numbers warrant, programs for the treatment, training and reintegration of Aboriginal offenders which take into account their culture and way of life.

3. Aboriginal spirituality shall be accorded the same status, protections and privileges as other religions. Native Elders, spiritual advisors and ceremonial leaders shall be recognized as having the same status, protection and privileges as religious officials of other religions, for the purposes of providing religious counselling, performing spiritual ceremonies and other related duties.

4. Where numbers warrant, correctional institutions shall provide an Aboriginal Elder with the same status, protection and privileges as an institutional Chaplain.

5. The correctional service shall recognize the spiritual rights of individual Aboriginal offenders, such as group spiritual and cultural ceremonies and rituals, including pipe ceremonies, religious fasting, sweat lodge ceremonies, potlaches, and the burning of sweetgrass, sage and cedar.

6. With the offender's consent, and where he or she has expressed an interest in being released to his or her reserve, the correctional authority shall give adequate notice to the Aboriginal community of a band member's parole application or approaching date of release on mandatory supervision, and shall give the hand the opportunity to present a plan for the return of the offender to the reserve, and his or her re-integration into the community.

7. There shall be an affirmative action program for the hiring and promoting of aboriginal professional staff to work with aboriginal offenders.

FEDERAL-PROVINCIAL ISSUES IN CORRECTIONS

Correctional Law Review
Working Paper No. 8,

February 1988

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review although only one part of the larger study is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal, legislation:

- the *Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons and Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14 month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and after care agencies victims' groups, an employee's organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this, the second, round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to Federal - provincial issues. Therefore, whenever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC) the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the

Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

Outlines the aims of this Working Paper, which are to deal with legal issues respecting the following three areas in federal-provincial matters in corrections:

1 The split in jurisdiction between the federal and provincial governments;

2 The exercise of the federal government's criminal law power to impose legislative prescriptions on the provinces' and territories' correctional systems; and

3 Federal-provincial irritants and emerging issues in federal-provincial relations in corrections.

PART I

Describes the federal-provincial split in jurisdiction in Canada and some of the options which have been proposed to address the anomalies, problems, duplications and overlaps which arise from the present split. To the Working Group it appears that:

- Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable;

- Since it is apparent that no unanimity exists, there will be no across-the-board change in the split.

The Paper asks whether federal law should explicitly authorize changes in the split by mutual agreement between the federal government and interested provinces or territories, where both parties wish to alter the current arrangements.

PART II

Describes the federal government's current approach to the use of the federal criminal law power to set out legislative requirements in the provinces and territories. Discusses the implications of the *Canadian Charter of Rights and Freedoms* in terms of the permissible differences in the treatment of offenders from one jurisdiction to another. Sets out options for an overall approach to federal legislative imposition of various types of standards on provincial and territorial corrections.

PART III

Lists federal-provincial-territorial irritants in corrections. These are of two general types: disputes regarding provision of and payment for services by one jurisdiction, to the benefit of another; and concerns about the imposition of federal restrictions on provincial and territorial discretion in the conditional release and remission spheres.

Discusses new or emerging areas in federal-provincial-territorial relations in corrections. Asks whether federal law should address any of these emerging issues, such as criteria or conditions respecting the transfer of an offender from one jurisdiction to another.

INTRODUCTION

In this Working Paper of the Correctional Law Review (CLR), issues will be reviewed which are of particular significance to the provinces. To some extent, some of these are covered in other Working Papers of the CLR, in particular the Working Paper on *Conditional Release*. This Paper will deal with three fairly distinct sets of issues: first, the federal-provincial split in jurisdiction; second, the overall approach which the CLR should take with respect to legislating new provisions which would affect provincial correctional administration; and third, a series of specific concerns at the provincial level.

As suggested by the nature of Correctional Law Review Project, only those issues will be dealt with which bear on what is currently contained in federal law in corrections, or what might conceivably be contained in such law as a result of decisions made through the CLR. Thus, matters which are of relevance to federal-provincial issues, but which do not reach the level of law, will not be covered in this Paper. On the other hand, certain issues are addressed which are not presently legislated, but which some have suggested could or should be resolved in law.

PART I: FEDERAL-PROVINCIAL SPLIT IN JURISDICTION

Perhaps the most notable characteristic of the administration of corrections in Canada is its fragmentation, both between levels of government, and within individual systems. Jurisdiction over corrections in Canada is established by the *Constitution Act, 1867*, sections 92(6) and 91(28), which provide that the provinces have jurisdiction over prisons and reformatories, and the federal government over penitentiaries. The distinction among these different types of penal institutions is established, in turn, in section 659 of the *Criminal Code*, which states that offenders sentenced to two years or more must be sentenced to imprisonment in a penitentiary. Offenders against provincial statutes are also sent to provincial jails, which hold a considerable number of such persons in addition to those sentenced for *Criminal Code* offences. As part of their Constitutional responsibility for the administration of justice, the provinces also administer all community-based sentences, such as suspended sentences with probation, fines and community service orders, as well as parole supervision in those provinces with their own parole boards. However, the federal government also conducts programs of community-based corrections, namely in the areas of temporary absence, parole supervision and mandatory supervision (MS) of offenders who are released from a penitentiary.

Although the provinces administer prison sentences, as part of its criminal law powers the federal government establishes certain powers and practices pertaining to provincial corrections. For example, the federal *Prisons and Reformatories Act* sets out certain provisions which touch upon this provincial responsibility, principally in areas which can affect the length and manner of serving the sentence. These issues will be dealt with in Part II of this Working Paper.

The parole power is created in the federal *Parole Act*, which creates the National Parole Board and enables the provinces to establish their own paroling authorities. The three largest provinces have their own paroling authority, and operate their own programs of parole supervision for those provincial prisoners who are paroled. However, for federal offenders and for those offenders held in provincial correctional systems in the remaining provinces and the territories, the federal government both makes releasing decisions and supervises those offenders who are conditionally released. Temporary absences, on the other hand, are administered by each correctional system, save that the National Parole Board is, in the federal system, responsible for unescorted temporary absences and for escorted temporary absences of offenders sentenced to life, until they are eligible for parole. Clemency on criminal cases is the sole responsibility of the federal government. Issues relating to release of various kinds will also be dealt with in the next Section.

The two-year rule, as set out in section 659 of the *Criminal Code*, has been described as both arbitrary and the source of duplications and overlap in federal and provincial responsibilities, in as much as both levels of government perform many of the same functions, albeit on different populations of offenders. Various committees and task forces have reviewed the two-year rule over the years, but to date no change has been made to the legislative provision for it.

The last major federal-provincial review of the matter was in 1976-78, in the form of the federal-provincial Steering Committee on the Split in Jurisdiction in Corrections.[1] This Committee was unable to agree on the ideal solution to the split, and instead recommended that improvements in coordination be made between the two levels of government. The *Justice System* report of the 1985 *Task Force on Program Review (Nielsen Task Force)*, which included representation from some provinces and territories but not all, also reviewed the split, and suggested that

> ...[the split] creates practical difficulties which impede effective service delivery and efficient administration. Both federal and provincial governments operate programs of imprisonment and programs of community supervision of offenders. Both systems must bear the attendant administrative and other overhead costs associated with their service delivery. The two levels of government often end up competing in an unhealthy way for staff, community services and private sector resources. Since the great majority of related social services (education, health care, housing, etc.) are largely delivered at the provincial level, there are problems of planning and coordination created by two levels of government, placing often conflicting demands and priorities upon these services.[2]

The Nielsen Task Force Study Team concluded that "interested provinces or groups of provinces [should] be allowed to assume full responsibility for all corrections within their borders, through the most appropriate mechanism (constitutional reform or delegation)".[3] The Task Force qualified this recommendation with the condition that certain basic standards of human rights, programs and dates of release eligibility would be assured through the federal criminal law power and through monitoring the spending of funds which would be transferred from the federal government".[4]

The Task Force also considered, but offered "less support" for, an option of greater use of exchange of services between the federal and provincial governments in order to reduce duplication and overlap in services. Under this option, "more program delivery functions could be passed to the provinces" through "ad hoc sharing arrangements", with the provinces retaining primary responsibility for community-based sentences and "institutions whose linkages to community services are of primary importance" and the federal government focusing on correctional services where security is the primary consideration.[5]

In 1987, the Canadian Sentencing Commission issued its report.[6] While making no specific recommendations about the split in jurisdiction, the Commission did make proposals about sentencing which would cause dramatic changes in the federal and provincial correctional populations if the two-year rule were not altered. The Commission felt that Canada has an over-reliance on imprisonment as a sentencing option, and would support a lesser use of imprisonment for non-violent offenders. In addition, the Commission would greatly reduce the average length of sentence by reducing the range of the sentence over which correctional authorities would have the power to release. Thus, the time served imprisoned by any offender would more closely approximate the actual sentence length imposed by the judge.

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[1] See Federal-Provincial Task Force on Long-Term Objectives in Corrections. *The Long-Term Objectives and Administration of Corrections in Canada.* (Ottawa: Solicitor General, 1976); and Federal-Provincial Steering Committee on the Split in Jurisdiction in Corrections. *Final Report to the Continuing Conference of Ministers responsible for Criminal Justice.* (Ottawa: Solicitor General, 1978).

[2] Canada. Task Force on Program Review. *The Justice System.* (Ottawa: Supply and Services, 1986), pp. 296-7.

[3] *Ibid.*, p. 288.

[4] *Ibid.*, pp. 288-9.

[5] *Ibid.*, p. 289.

[6] Canada. The Canadian Sentencing Commission. *Sentencing Reform: A Canadian Approach.* (Ottawa: Supply and

Clearly, if the two-year rule remained under the Commission's scheme, there would be more persons given community-based sentences and sentences of less than two years, while a far lesser proportion of the total number of incarcerated offenders in Canada would be sent to a federal penitentiary.

Persons sentenced to imprisonment would, however, serve more of their sentence in close custody, before eligibility or entitlement to release. The impact of such an initiative on provincial correctional budgets would certainly be the subject of considerable federal-provincial discussion.

The *Provincial Consultation Paper*[7], issued by the Correctional Law Review for the purpose of discussions with provincial governments in July 1985, once again posed the question of changing the two-year split. In the written responses which were submitted, the majority of the seven provinces and territories which responded favoured retention of the two-year split. British Columbia suggested that "provincial takeover" would be the most rational approach, but recognized that the current situation is most acceptable at this time due to the fiscal burdens which would be expected from a provincial takeover. Manitoba (in response to the Consultation Paper) preferred that corrections become a federal responsibility, with provision for provinces that wish to opt out to be able to do so. Ontario expressed the view that the matter should be subject to further discussion after the completion of the CLR, and noted that any changes would depend on "an appropriate agreement for the continued federal funding and cost-sharing in correctional services". Both Quebec and the Northwest Territories opted for the status quo, but with more exchange of services between levels of government. The Canadian Association of Paroling Authorities (CAPA) has, however, indicated that its views should not be taken as supportive of the two-year rule.

OPTIONS

Thus, not all interested parties agree that the present split in jurisdiction should stand, or that it should be amended. In a matter as fundamental as this, it would seem that any suggestion of federal imposition of a new Constitutional arrangement would be both inappropriate and unlikely. Therefore it appears to the CLR Project Team that:

Services, 1987).

[7] Correctional Law Review. *Provincial Consultation Paper*. (Ottawa: Solicitor General, 1985).

> **Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable.**
>
> **Since it is apparent that no unanimity exists, there should be no across-the-board change in the split.**

However, the question remains as to whether, as the Nielsen Task Force suggested, there could be a change affecting only those provinces and territories, or groups thereof, who would be interested in such a change. In other words, if no jurisdiction should have a change in the split forced upon it, perhaps the converse should be true as well: that federal law should permit a radical change in the split if both federal and individual provincial or territorial governments agreed.

At present, federal law permits exchange of service agreements[8] between the CSC and provincial correctional (and mental health) departments, but the language of the provisions appears to contemplate limited usage, rather than complete devolution of correctional responsibilities to one jurisdiction or another. While there might be sufficient authority in s.15 of the *Penitentiary Act* and in s.4 of the *Prisons and Reformatories Act* for the Solicitor General to authorize comprehensive devolution agreements with interested provinces or groups of provinces, when taken together with the enabling provisions of the *Parole Act*, if this is viewed as a reasonable policy option, it would be preferable to explicitly authorize it in the legislation.

Although most analyses of the split have not offered serious objections to the option of complete provincial takeover of corrections, some concerns might be raised. It might be argued that the federal government should remain in the business of corrections, at least to some extent, in order to represent a certain standard, to promote indirectly certain uniformities of practice or innovative programs, or to administer certain correctional programs of a unique or infrequently-used nature (such as super-maximum security housing for those relatively few offenders who are dangerous to others in a prison environment). The implication of s.15 of the *Charter* as between provinces is discussed below, at pp. 14-15.

Presumably, each of these concerns could be addressed to at least some extent by legislative refinement or other means, such as permitting the federal government to conduct certain specialized programs, or by establishing certain standards governing correctional programs or systems devolved to the provinces.

Although the reverse option is rarely advocated, it would of course be possible for the federal government to administer, at the invitation of a province or territory, all correctional services within a province or territory. This option, like its converse, would reduce duplication and overlap, eliminate competition for services, and permit the pooling of resources and programs for all offenders who need them. It would not, however, carry the advantage of having the correctional and social service functions handled by the same level of government.

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[8] *Penitentiary Act*, ss. 15 and 19, and *Prisons and Reformatories Act*, s. 4.

> **Should federal correctional law explicitly authorize changes in the split in jurisdiction by mutual agreement between the federal government and interested provinces or groups of provinces and territories?**

Readers' answers to this question may, of course, vary according to whether such a change would be accompanied by standards governing the quality, nature or substance of the services transferred. More will be said in the next Part about the types of standards which would have to be considered.

Under a model involving a complete takeover by one or more province or territory of the Correctional Services within their borders, the question naturally arises of whether the paroling authority for all offenders in each system should also devolve to the province or territory. The Nielsen Task Force suggested that in a system of "provincialized" corrections, it would also make sense to "provincialize" the administration of the parole authority.[9] This was justified on the grounds of optimal coordination of correctional and paroling functions, reduction in duplication and overlap of effort, the rendering of decisions in an expeditious fashion and the desirability of smaller, local decision-making authorities. Presumably, however, the full "provincialization" of parole decisions would make little or no sense except in a system of "provincialized" corrections.

> **Should federal correctional law explicitly authorize provincial authority for release decisions with respect to all offenders housed within provincial or territorial borders if a province or territory assumes full responsibility for all correctional operations within its borders? Should federal correctional law explicitly authorize the reverse type of arrangement?**

Alternative means for the federal government to maintain certain standards in the services for which it is constitutionally responsible are possible. Because of limitations on provincial capacity to offer additional services, it is likely that no devolution would occur without federal financial compensation to the provinces, and the funds could be tied to administratively established standards and an audit process. A middle ground between these two options would be for federal law to mandate the establishment of standards, perhaps mentioning specifically certain areas, and a procedure for monitoring of federal funds transferred to the provinces.

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[9] *Task Force on Program Review*, *supra*, note 2, pp. 329.

PART II: THE CLR APPROACH TO SETTING OUT LEGISLATIVE REQUIREMENTS IN THE PROVINCES

In this section, we will explore questions related to the overall approach which the CLR should take towards either preserving or enacting provisions in federal correctional law which affect the provinces.

Certain legislative provisions exist now at the federal level which pertain to the administration of corrections at the provincial level. These provisions derive from the federal criminal law power. The purpose of this power, which is provided in addition to the provinces' constitutional responsibilities for the administration of justice, was to ensure certain national criminal justice standards through the federal legislative power, while permitting the provinces the necessary flexibility to respond to local and regional concerns.

The federal approach to the *Prisons and Reformatories Act* in recent years has been to amend the *Act* increasingly in such a way as to grant the provinces greater discretion over the operation of their institutions. What remains deals almost entirely with matters affecting time served in close custody such as release through temporary absences, and remission. Although the provision which is made in the *Act* for the existence of remission does not appear to present many problems for provincial correctional authorities, the *Act*'s imposition of a 15-day limit on the duration of temporary absences is a major irritant. Many provinces make extensive use of "back-to-back" temporary absences - that is, extend them successively beyond 15 days - and object to having to violate the spirit, if not the letter, of the *Act*.

Parole in its present form was established through the federal *Parole Act* of 1959. At that time, the *Act* created the National Parole Board as the sole paroling authority in the country, but in 1977, in response to requests from certain provinces, the *Act* was amended to enable the provinces to establish their own parole boards to govern the release of all provincial inmates serving sentences other than life imposed as a minimum or indeterminate sentences (although normally sent to federal custody, offenders with life or to indeterminate sentences may become provincial prisoners through transfer to provincial institutions). Three provinces (Ontario, Quebec and British Columbia) have now created their own paroling authorities and they have authority over some three-quarters of all offenders held in provincial institutions. In the remaining provinces and the territories, the National Parole Board remains the paroling authority for provincial prisoners.

The *Parole Act*'s provisions with respect to provincial parole establish consistent practices in certain critical areas. Provincial regulations pertaining to the operation of provincial parole boards are, by virtue of section 9(4) of the *Act*, void if they are inconsistent with any provision of the *Act* or federal regulations; consequently, federal law establishes for provincial as well as federal paroling authorities the criteria governing release, the times of eligibility, and a few other important matters.

An essential question for the CLR is whether it is appropriate for federal law to continue to impose certain constraints on provincial correctional authority. In addition, in as much as the CLR may enact new provisions governing the exercise of federal correctional authority, there is the further question of the extent to which such new provisions should apply equally to provincial correctional authorities.

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

All correctional legislation, whether federal or provincial, must be in compliance with the equality rights provisions of section 15 of the *Charter*. Section 15 defines the right to equal protection and equal benefit of the law without discrimination. According to Section 15(l):

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental disability.

On the face of it, this would appear to mean that any protections or benefits that are provided to either federal or provincial inmates must apply equally to both groups without discrimination. However, notwithstanding that being an inmate is not one of the listed prohibited grounds of discrimination, the courts in interpreting s.15 have stated that the essential meaning of the Constitutional requirement is that persons or groups who are "similarly situated be similarly treated, and conversely, that persons who are differently situated be differently treated. The issue for consideration is whether the law treats members of two classes differently, and whether any differences between the two classes are relevant to and justify the difference in treatment."[10]

The "similarly situated" test has been applied in a equality rights case based on different treatment of federal and provincial inmates in regard to mandatory supervision. In *Dempsey v. The Queen and A.-G. for Ontario*,[11] the Federal Court, Trial Division, concluded that federal inmates are not "similarly situated" with provincial inmates in respect of entitlement to mandatory supervision. According to Mr. Justice Muldoon, in analysing the "inherent dissimilarity between federal and provincial inmates" it is necessary to realize that "there is an exponentially intensifying continuum of culpability which proceeds from the minor to the grievous. A statutory line of differentiation (2 years) is drawn rationally, if somewhat pragmatically, across it ... Those whose degradations are more serious undergo a longer confinement with more elaborate supervision.... on the other side of the line, the confinement is of shorter duration .... This [MS] is not discrimination of the kind so evidently condemned in s. 15 of the *Charter*". The Court of Appeal has affirmed this decision.

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[10] *Andrews v. Law Society of B.C.* (1987) 2 BCLR (2d) 305 (BCCA) on appeal in the Supreme Court of Canada.

[11] *Dempsey v. The Queen and Attorney-General for Ontario* (1986) 32 CCC (3d) 461 (FCTD).

Thus, this decision finds that this difference in treatment of federal and provincial inmates is non-discriminatory, based on the fact that federal inmates are, as a group, "more serious" offenders than provincial inmates. The differences between federal and provincial inmates will not justify all differences in treatment, however differential treatment will have to be justified in every case on the basis of relevant differences between the two groups of inmates.

It is also important to remember that not all differences in treatment will be upheld by the courts. Any differences in treatment must also be reasonable and fair, having regard to the purposes and aims of the legislation and its effects on persons adversely affected. Thus, there is still much uncertainty surrounding the future effect of the *Charter* on current and future differences between the federal and provincial correctional systems.

The second major area of concern is relation to equality rights is whether section 15 is violated by differences in treatment as between provinces, of persons imprisoned for committing criminal or other federal offences. Recent decisions involving matters of split federal and provincial jurisdiction and cooperation[12] indicate that section 15 has imposed limits on Parliament's power to enact federal legislation that discriminates between similarly situated persons based on their province of residence. Departures from the principle of equality will only be permitted if they meet the criteria laid down in the decision of *R. v. Oakes*[13], that the legislation is in furtherance of a valid federal objective of sufficient importance to warrant overriding a constitutionally protected right; the means employed are reasonable and demonstrably justifiable in that the measures are fair and not arbitrary, designed to achieve employed are reasonable and demonstrably justifiable in that the measures are fair and not arbitrary, designed to achieve the objective and rationally connected to that objective, they impair the infringed right as little as possible, and there is proportionality between the effects of the measures and the objective.

The implications of *Hamilton* and related cases are that federal correctional policy must accord with section 15 of the *Charter*, and that the courts may require provincial governments to implement that federal policy or may strike down the policy itself for leaving undue discretion to the provinces. Thus in federal-provincial matters, the federal government should ensure that it treats similarly situated persons in a similar fashion.

OPTIONS

As was seen in Part I, the Nielsen Task Force suggested that, even with the transfer of all correctional service delivery to the provinces, the federal criminal law power ought to apply in three areas: human rights, dates of eligibility for conditional release, and offender programs.

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[12] *R. v. Hamilton, R. v. Asselin, R. v. McCullough* (1986), 57 O.R.(2d) 412 (Ont. C.A.), leave to appeal refused, (1987), 59 O.R.(2d) 399 (SCC).

[13] *R. v. Oakes* (1986) 1 SCR 103.

The 1977 MacGuigan Committee on the Penitentiary System in Canada complained of the two-year rule because:

> the provinces are not able to allocate equal amounts of financial and human resources to their correctional services, so that the quality of treatment varies widely, depending on the resources available to each province. It is therefore possible for an inmate incarcerated in a poor province to be subjected to much harsher conditions than an inmate who is imprisoned for the same offence in a wealthier province. The jurisdictional split also impedes the development of a coherent system of correctional treatment in Canada, since programs existing in federal institutions may or may not be available in provincial institutions and vice versa.[14]

This question of federal legislation in the provincial correctional sphere has been raised in CLR consultations to date. Provinces generally have been of the view that it is consistency rather than absolute uniformity which we should strive for. They suggest that while consistency between provinces in matters of early release and remission is necessary, there are legitimate differences between provincial systems and inmates and the federal system and inmates which justify different programs and approaches.

With respect to the philosophy of corrections, all jurisdictions agree that a common approach is desirable. There are however serious disagreements as to how this might be achieved.

Questions related to this issue were posed in the 1985 *Provincial Consultation Paper*[15] of the CLR. Written responses to the Paper varied. Six of the eight provinces and territories which responded on this issue favoured placing in law a statement of objectives and principles governing corrections, although there has since been a shift in opinion on this question. Most respondents were, however, opposed to establishing national uniformity in law respecting conditional release from imprisonment. One respondent suggested that the important issue was not uniformity but rather "the confusion which exists regarding the various kinds of early release". Another argued in favour of uniformity, suggesting that "there is a need to limit correctional discretion and ensure the consistent application of principles of fairness and equity". Still another contended that "national uniformity in broad terms is essential" and should be established "in those areas which address length of time and nature of the review" (for release).

Subsequent consultations with provincial correctional officials suggest that while provinces could agree to a common policy statement, they would view the enactment of a statement of philosophy in federal legislation governing both federal and provincial corrections as being an inappropriate intrusion on provincial ability to legislate in respect of provincial corrections, and indeed, on their ability to run their systems as they think most appropriate.

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[14] Canada. Sub-Committee on the Penitentiary System in Canada. *Report to Parliament*. (Ottawa: Supply and Services, 1977), p. 39.

[15] *Supra*, note 7.

A number of broad options seem to present themselves, ranging from complete federal withdrawal from legislating in the provincial correctional sphere, to expansion of current federal law in certain areas.

What approach should the Correctional Law Review adopt to the exercise of the federal criminal law power as it pertains to provincial correctional authority? For example, which of the following options represents the best approach? Are there others to suggest?

1 **Complete federal withdrawal from legislating any constraints on provincial correctional discretion?**

2 **Enactment of a statement of purpose and principles only?**

3 **The status quo (i.e., deals principally with remission and early release)?**

4 **The status quo, plus a statement of purpose and principles?**

5 **The status quo, plus legislation in essential areas of human rights, basic programs and early release and remission?**

6 **The status quo, plus legislation in essential areas of human rights?**

7 **Legislation which would establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law?**

Let us examine each of these possible options in turn.

1 Complete federal withdrawal from legislating any constraints on provincial correctional discretion

Under this option, the federal government's exercise of its criminal law power, other than its enabling powers, would cease at the time of sentence and sentence appeal, with the exception of the Royal Prerogative of Mercy (pardons), the law and presumably practice of which would still rest with the federal government in respect of offences against federal statutes. (Conceivably, however, Her Majesty could decide to devolve this power to the provincial Lieutenant-Governors).

Thus, this option would place no restrictions on when, by whom, under what conditions, and for how long, or for what portion of the sentence, any provincial offender could serve or be released from a prison sentence. The *Prisons and Reformatories Act* would contain only the necessary provincial authorities needed to carry out its responsibilities (for example, the authority for inter-inter-provincial transfers and the authority for temporary absences and remission credits against the sentence). The *Parole Act* would contain, in respect of provincial parole, only the authority to parole. None of the present restrictions on these authorities - such as the permissible length of temporary absences and the date of earliest eligibility for parole - would remain.

Many of the provinces have advocated some form of this option, at the least including removal of the 15-day limit on unescorted temporary absences. As noted earlier, many provinces rely on the use of TA power which is broad enough to permit full release into the community for large numbers of offenders.

This option runs contrary, however, to the thrust of the recent Canadian Sentencing Commission report, *Sentencing Reform: A Canadian Approach.*[16] he Commission felt that there should be greater judicial control over the entire range and "meaning" of the sentence, and recommended a reduction in the proportion of a sentence of imprisonment which may be reduced through remission (reduced from one-third to one-quarter) or "day release" (available at the two-thirds mark in the sentence instead of at one-sixth). These changes to post-sentence release authorities would, according to the Commission's recommendations, be enacted in federal law, and sentencing guidelines and other sentencing matters would be the responsibility of a permanent Sentencing Commission established by Parliament.

Public reaction to federal removal of all restrictions on early release eligibility for provincial offenders would be expected to be at least somewhat negative. Although provincial prisoners are known or assumed by some members of the public to be of a generally lesser risk than federal offenders, public sympathy towards released offenders as a group is not high. To some extent, this view is conditioned by inaccurate perceptions about recidivism, and many Canadians' "hard" views about certain criminal justice issues soften when they are presented with the details of individual cases. Nonetheless, there might be expected to be public opposition to this option, if it were accompanied by public perceptions that too many provincial offenders would inappropriately be released too early in their sentence.

2 Enactment of a statement of purpose and principles only

In the CLR's Working Paper on *Correctional Philosophy*[17] a statement of purpose and principles is proposed to govern the administration of federal corrections.

The statement proposed in that paper (currently under discussion for possible improvements) is as follows:

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[16] *Supra*, note 6.

[17] Correctional Law Review. *Correctional Philosophy*. (Ottawa: Solicitor General, 1986).

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a. carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b. providing the degree of custody or control necessary to contain the risk presented by the offender;

c. encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d. encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e. providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society.

The purpose is to be achieved in a manner consistent with the following principles:

1 Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2 The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3 Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4 In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7 Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8 The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

Placing the same or a similar statement in federal law governing provincial corrections, even if all provinces agreed with the substance of the statement, would be opposed by a majority of the provinces as unnecessary and potentially the subject of extensive litigation, both frivolous and significant. At the other extreme, it has been suggested that such a statement would be unnecessary because it would have no effect.

Favouring the enactment of such a statement of purpose and principles is the view that corrections, as a profession, ought to be guided by a professional credo, a statement of its mission. The 1977 *Parliamentary Subcommittee on the Penitentiary System (MacGuigan Committee)*[18] spoke of a "corrosive ambivalence" at the line level within corrections about the "purpose or direction" of corrections. A legislated statement of purpose and principles would serve, for federal and provincial correctional workers alike, as a "sword and shield" in the carrying out of their duties. For legislators, the statement is a signal about what minimum needs have to be addressed in correctional budgets. For offenders, the statement might be used to interpret correctional policies and decisions, but it would be unlikely to serve as the sole basis for an attempt, for example, to have the courts make orders to or against correctional authorities.

Under this option the federal government would repeal current provisions which restrict matters like the permissible purposes of parole, remission and TAs, and the proportion of the sentence which can be affected by the operation of these programs. Instead of these restrictions, any concerns about provincial use of these powers would be addressed through, for example, the legislated purpose to provide "the degree of custody or control necessary to contain the risk presented by the offender".

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[18] Sub-Committee on the Penitentiary System in Canada, *supra*, p. 156.

3 The status quo

The *Parole Act* and the *Prisons and Reformatories Act* contain two principal types of provisions. Enabling provisions include the authority for ESAs, the authority of provincial officials to release offenders on TAs or on parole, to transfer offenders, to make regulations, and to order the forfeiture of contraband from an inmate. Each of the authorities which touch on release or potential release of the offender is subject to certain qualifications. As was noted earlier, provincial parole regulations must be in accordance with the provisions of the *Parole Act*. Remission is limited to one-third of the sentence, and the criterion for earning it ("industrious application") is established in the *Prisons and Reformatories Act*. The purposes of TAs are stated in the *Prisons and Reformatories Act* (medical, humanitarian and rehabilitative), and the 15-day limit on their duration established.

The second group of federal statutory provisions relating to the provinces deals with the rights and obligations of offenders. While most were repealed in 1986, there remain provisions governing the forfeiture of remission as a punishment for breaches of prison regulations.

Undoubtedly the principal complaints of the provinces about the status quo are the 15-day limit on TAs in the *Prisons and Reformatories Act*, and s.16(l) of the *Penitentiary Act*. Few of the remaining provisions have been the subject of sustained provincial comment.

4 The status quo, plus a statement of purpose and principles

Another of the many possible permutations of options would be for federal legislation in the provincial correctional area to extend to the sentence administration areas covered under the status quo, in addition to an enactment of a statement of purpose and principles. This would leave the provinces and territories free to adapt their systems to their own needs, within parameters established by statements of values which are generally accepted by corrections professionals. Differences in the treatment of offenders between provinces and between the provinces and the federal government would be subject to *Charter* challenges but not to detailed federal prescription.

5 Legislation in essential areas of human rights, basic programs, and early release and remission

Under this option, the scope of current federal legislation would be clearly focused on three areas beyond enabling provisions: human rights, basic programming for offenders, and release from imprisonment.

The CLR's Working Paper on *Inmate Rights* sets out various approaches respecting the articulation in law of rights of federal inmates and the basis for limiting, where necessary and appropriate, rights protected by the *Charter*. This option would not go so far as to incorporate into federal law respecting provincial corrections all the human rights provisions which might eventually be enacted respecting federal corrections. (The last option in this series would.)

Rather, legislation might simply mandate the enactment in provincial regulations of permissible limitations on *Charter* rights of offenders, or mandate the maintenance of effective remedies to protect the rights of provincial offenders, or do both.

Programs to assist offenders to avoid re-offending are considered, by most critics and professionals, to be an essential component of corrections. Few would argue that correctional intervention has been fully tried, meaningfully evaluated, and "proven" to be ineffective and unworkable.

Perhaps even fewer would suggest that there are no defensible grounds for making rehabilitative programs available to offenders, except in those cases of offenders serving only a few hours or days in jail. Indeed, most penal institutions provide programs of one sort or another for the prisoners in their charge.

Under this option, federal law might compel provincial authorities to provide rehabilitative programs to those offenders who are serving sentences not clearly intended only for deterrent or denunciatory purposes, including very brief jail terms. The law might require nothing beyond the obligation to make programs available to offenders, and perhaps to encourage offenders to take advantage of them.

Alternatively, the law might also specify the types of programs - education, training, social development, work - which the system would need to provide.

Under this option, in the early release area, the current provisions in the *Parole Act* and the *Prisons and Reformatories Act* would remain, and perhaps others would be added, such as the obligation for provincial authorities to promulgate guidelines for release decisions, or to enact provisions for the review of or appeal from release decisions. Any new provisions would need to be considered essential to preserve independent, fair, quality release decisions.

6 The status quo, plus legislation in essential areas of human rights

Under this option, the features of the previous option would be present, except that there would be no reference to programs to meet offenders' needs. This would meet provincial concerns about the federal government entering into the previously untouched area of programming in provincial prisons. Some provinces and territories are able to maintain only limited programs, or programs only at certain institutions, because of budgetary restrictions. This option would also offset concerns about the provinces having to make programs available to offenders who were sentenced for purely denunciatory reasons, such as those given a sentence of a few days, or having to encourage offenders to participate in programs if they clearly have no intention of deriving any benefit from programs. (Some correctional experts feel that programs will only work if offenders enter into them with at least some measure of voluntariness.)

7 Legislation which would establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law

A large number of additional provisions might be added to existing federal law under this option. The *Parole Act* and *Regulations* would contain identical provisions respecting the operation of parole and MS. Depending on the final resolution of federal law respecting federal corrections, this option could mean additional provincial obligations ranging from a few references to peace officer powers, to a large number of new provisions respecting offender rights, staff powers and obligations, the rights and obligations of victims in the correctional process, and so on.

This option reflects a heavy emphasis on statutory rights and obligations rather than policy and common law, and a broad interpretation of sections 1 and 15 of the *Charter*.

PART III: FEDERAL-PROVINCIAL IRRITANTS AND EMERGING ISSUES

In this Section, we will review the matters which are an irritant or a potential irritant to the provinces or to the federal government in respect of the current law, and suggest other areas of a specific nature which need to be addressed in the CLR.

MATTERS RELATING TO FEDERAL-PROVINCIAL FUNDING ARRANGEMENTS.

Under this heading can be grouped provincial complaints and federal concerns about federal payment or non-payment for provincial services, and Exchange of Service Agreements (ESAs). Linked to the consideration of various federal-provincial issues is the matter of costs borne by the provinces and by the federal government in areas of shared or disputed responsibility. The Correctional Law Review is, as noted above, concerned only with matters of law, but in the federal-provincial area, there are numerous funding issues which are linked to statutory and regulatory provisions, or which, in the view of one party or another, should be dealt with in law in order to clarify the financial questions.

The provinces have a number of complaints about their ability to recover from the federal government the costs which the federal government does not cover, or cover adequately. For example:

- some provinces argue that the federal government ought to assume all financial responsibility in relation to federal offenders, i.e., from the moment an offender is sentenced to two years or more, the federal government would pay for all custody, programs, legal aid, medical care, transportation and demands on police resources and other justice system costs.

- all provinces and territories argue that the federal government ought to reimburse the provinces for the costs of s.16(l) of the *Penitentiary Act*. Section 16(l) requires that federal offenders shall not be received in penitentiary until their appeal period has expired or until the offender notifies the court that he is not appealing or has abandoned his appeal. The length of the appeal period is set by the provincial superior courts in their Rules and is thirty days in all provinces but one. The federal government has for years taken the position that the provinces should bear the financial responsibility for housing the offender during the Section 16(l) period, while the provinces largely take the view that an offender sentenced to penitentiary should be the financial responsibility of the federal government from the date of sentencing. The law is silent on the question of financial responsibility.

- a number of the provinces feel that s.16(l) of the *Penitentiary Act* should be repealed, and that the federal government should be required to accept its offenders from the date of sentence, at the request of the province;

- most, if not all, provinces argue that the federal government should bear all or more of the cost of transporting federal offenders for the purpose of penitentiary placement, court appearances, and suspension and revocation of conditional release;

- the provinces argue that the federal government should bear the cost of housing all federal offenders whose release has been suspended, whether or not new charges are involved.

Bearing the costs of provincial parole preparation, decision-making and supervision in those provinces and territories without their own paroling authority and service is a concern for the federal government. The provinces benefit financially as well as otherwise from the operation of parole, simply because it is so much cheaper to supervise an offender in the community than in an institution. Those provinces which now operate their own parole authorities bear the costs of their own parole systems.

MATTERS RELATING TO RESTRICTIONS ON CONDITIONAL RELEASE AND REMISSION OF SENTENCE

We have reviewed a number of irritants in this area:

- the 15-day restriction on unescorted temporary absences in the *Prisons and Reformatories Act*;

- the federal government's obligation to impose mandatory supervision on transferred provincial offenders;

- the necessity of making provincial parole regulations (and practice) consistent with the provisions of the *Parole Act*;

- federal limits on the amount of remission which can be earned by provincial offenders, and on what basis;

- federal limits on the purposes which can be served by temporary absences at the provincial level.

Views on each of these issues vary with the different perceptions which exist of the value of provincial autonomy and federal/provincial consistency.

NEW OR EMERGING MATTERS

Probably the most significant correctional issue negotiated at the federal-provincial level, especially in recent years, is exchange of services between the two levels of government.

Up until a few years ago, federal-provincial Exchange of Service Agreements (ESAs), whereby one jurisdiction might house offenders sentenced to another's care, or provide other types of service for another, were not extensively used. One of their key uses was for female offenders. Since there is only one federal penitentiary for women, in Kingston, federal female offenders sentenced outside Ontario could not be housed in their home province except under an ESA with a provincial correctional system.

In recent years, however, the use of ESAs has increased, and now several hundred federal offenders are presently transferred to provincial correctional systems. Federal offenders who are suspended from a conditional release can also be held in a provincial institution under ESAs. In addition, Alberta has concluded an Agreement with the federal government to conduct community supervision of all federal offenders released within its borders. Other provinces are engaged in discussions on the possibility of their supervising federal offenders in remote areas, where it is not cost-effective for the Correctional Service of Canada to maintain parole offices for those relatively few federal offenders who are released to these areas. These "new generation" ESAs have included provision for transportation between systems and other necessary elements for expanded usage.

The increase in ESA use has thus caused an increasing blurring of the distinction between the federal and provincial systems. A "federal" offender is less and less seen as a distinct creature who can be appropriately housed only by the federal system, and vice versa.

This increased use of ESAs which are principally used for housing federal inmates in provincial jurisdictions creates a greater federal interest in how provincial programs are run.

For example, the Correctional Service of Canada and the National Parole Board are currently conducting, in partnership with the provinces and the private sector, a review of standards for community supervision of offenders. This study was inspired in part by the need for both agencies to be assured of a certain standards and level of service for federal offenders being supervised by the CSC, by provincial staff, or by the private sector, either directly or on contract with the province.

In order to clarify key areas and head off possible federal-provincial disputes, should federal law address any of the principles or standards issues in ESAs? Or are there more appropriate ways, such as policy, to address the following issues?

- **whether any transfer of an offender from one jurisdiction to another should be done without his consent?**

- **whether any transfer of an offender from one jurisdiction to another should disadvantage the offender in relation to programs, eligibility for release, or significant rights areas?**

- **whether a transfer should normally offer some benefit to the offender, such as an enhanced opportunity to reintegrate successfully into the community?**

- **whether program standards governing correctional service purchased by one jurisdiction from another should be specified in policy?**

- **whether any significant change in service delivery (such as contracting out the service previously delivered directly by the province, territory, or the federal government) be subject to the approval of the purchaser?**

For a more extensive discussion of the most appropriate placement (e.g., in law, in policy) of matters such as these, the reader is referred to *A Framework for the Correctional Law Review* (1986), the second Working Paper in the CLR series.[19]

Are there other present or potential future federal-provincial irritants which ought to be addressed in legislation?

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[19] Correctional Law Review. *A Framework for the Correctional Law Review.* (Ottawa: Solicitor General, 1986).

CONCLUSION

This Paper, which is intended principally for provincial and territorial governments, addresses federal-provincial-territorial issues and irritants in corrections.

It suggests that there is unlikely to be any across-the-board change in the split in jurisdiction in corrections in Canada because not all parties agree on the most appropriate new formulation for the split. However, it asks whether federal law should explicitly authorize a *de facto* change in the federal-provincial or federal-territorial division of responsibilities in corrections, where both parties wish to alter the current arrangement. The Paper recognizes that individual responses to this question may vary according to the reader's views about such practical questions as fair and reasonable financial compensation for services previously assumed by another party, and the feasibility and effectiveness of ensuring the provision of a certain standard of service.

The Paper turns next to the question of whether and how, under the current split in jurisdiction or under a different scheme of division of correctional responsibilities, the federal government should continue to impose certain legislative standards on the provincial and territorial systems of corrections. Various broad options for proceeding are described. A reader's views on this question will be influenced by such factors as his or her perception of the desirability of regional and local variation and discretion, and the appropriateness of ensuring that offenders are treated in a similar fashion in respect of certain key areas.

Finally, certain specific issues are addressed which represent either irritants in the current system, or new and emerging issues in federal-provincial-territorial relations in corrections. The Paper asks whether the law is the appropriate vehicle for addressing these matters.

APPENDIX "A"

LIST OF PROPOSED WORKING PAPERS OF THE CORRECTIONAL LAW REVIEW

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Correctional Issues Affecting Native Peoples

Federal-Provincial Issues in Corrections

Mental Health Services for Penitentiary Inmates

International Transfer of Offenders

APPENDIX "B"

A STATEMENT OF PURPOSE AND PRINCIPLES FOR CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society.

The purpose is to be achieved in a manner consistent with the following principles:

1. Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2. The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3. Any punishment or loss of liberty that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4. In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5. Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6. All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7. Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance and restoration of membership in the community of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8. The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives

APPENDIX "C"

SUMMARY OF QUESTIONS AND RECOMMENDATIONS

- Any change to the law resulting in a change to the federal-provincial split in jurisdiction all across Canada should only be made if all parties believe that change in a certain direction is desirable.

- Should federal correctional law explicitly authorize changes in the split in jurisdiction by mutual agreement between the federal government and interested provinces or groups of provinces and territories?

- Should federal correctional law explicitly authorize provincial authority for release decisions with respect to all offenders housed within provincial or territorial borders if a province or territory assumes full responsibility for all correctional operations within its borders? Should federal correctional law explicitly authorize the reverse type of arrangement?

- What approach should the Correctional Law Review adopt to the exercise of the federal criminal law power as it pertains to provincial correctional authority? For example, which of the following options represents the best approach? Are there others to suggest?

1. Complete federal withdrawal from legislating any constraints on provincial correctional discretion?

2. Enactment of a statement of purpose and principles only?

3. The status quo (i.e., deals principally with remission and early release)?

4. The status quo, plus a statement of purpose and principles?

5. The status quo, plus legislation in essential areas of human rights, basic programs and early release and remission?

6. The status quo, plus legislation in essential areas of human rights?

7. Legislation which should establish complete uniformity between federal and provincial corrections in all areas important enough to be covered in law?

In order to clarify key areas and head off possible federal-provincial disputes, should federal law address any of the principles or standards issues in Exchange of Service Agreements? Or are there more appropriate ways, such as policy, to address the following issues?

- whether any transfer of an offender from one jurisdiction to another should be done without his consent?

- whether there should be any limits on the transfer of an offender from one jurisdiction to another which would disadvantage the offender in relation to programs, eligibility for release, or significant rights areas?

- whether a transfer should normally offer some benefit to the offender, such as an enhanced opportunity to reintegrate successfully into the community?

- whether program standards governing correctional service purchased by one jurisdiction from another should be specified in policy?

- whether any significant change in service delivery (such as contracting out the service previously delivered directly by the province, territory, or the federal government) be subject to the approval of the purchaser?

Are there other present or potential future federal-provincial irritants which ought to be addressed in legislation?

MENTAL HEALTH SERVICES FOR PENITENTIARY INMATES

Correctional Law Review
Working Paper No. 9,

February 1988

PREFACE

The Correctional Law Review is one of more than 50 projects that together constitute the Criminal Law Review, a comprehensive examination of all federal law concerning crime and the criminal justice system. The Correctional Law Review, although only one part of the larger study, is nonetheless a major and important study in its own right. It is concerned principally with the five following pieces of federal legislation:

- the *Department of the Solicitor General Act*
- the *Penitentiary Act*
- the *Parole Act*
- the *Prisons & Reformatories Act*, and
- the *Transfer of Offenders Act*.

In addition, certain parts of the *Criminal Code* and other federal statutes which touch on correctional matters will be reviewed.

The first product of the Correctional Law Review was the *First Consultation Paper*, which identified most of the issues requiring examination in the course of the study. This Paper was given wide distribution in February 1984. In the following 14-month period consultations took place, and formal submissions were received from most provincial and territorial jurisdictions, and also from church and aftercare agencies, victims' groups, an employees' organization, the Canadian Association of Paroling Authorities, one parole board, and a single academic. No responses were received, however, from any groups representing the police, the judiciary or criminal lawyers. It is anticipated that representatives from these important groups will be heard from in this second round of public consultations. In addition, the views of inmates and correctional staff will be directly solicited.

Since the completion of the first consultation, a special round of provincial consultations has been carried out. This was deemed necessary to ensure adequate treatment could be given to federal - provincial issues. Therefore, wherever appropriate, the results of both the first round of consultations and the provincial consultations have been reflected in this Working Paper.

The second round of consultations is being conducted on the basis of a series of Working Papers. A list of the proposed Working Papers is attached as *Appendix A*. The Working Group of the Correctional Law Review, which is composed of representatives of the Correctional Service of Canada (CSC), the National Parole Board (NPB), the Secretariat of the Ministry of the Solicitor General, and the federal Department of Justice, seeks written responses from all interested groups and individuals.

The Working Group will hold a full round of consultations after all the Working Papers are released, and will meet with interested groups and individuals at that time. This will lead to the preparation of a report to the government. The responses received by the

Working Group will be taken into account in formulating its final conclusions on the matters raised in the Working Papers.

EXECUTIVE SUMMARY

INTRODUCTION

Outlines the aims of the paper, which are to:

- examine and discuss questions surrounding mental health services for penitentiary federal inmates that can be addressed in federal correctional legislation;

- put questions concerning mentally disordered offenders in context by providing a sense of the mental health service problem in broad terms; and

- present proposals for consultation that attempt to provide a legal framework that will allow reliable programs and treatments of benefit to the inmate.

PART I

Sets out the dimensions of the mental health services problem, provides necessary definitional and statistical data and discusses the critical issue of jurisdiction.

PART II

Examines the nature and scope of a right of treatment, and any legal and practical limits that may confine an obligation to provide treatment to mentally disordered offenders. Attempts to define a right or obligation respecting mental health services in federal correctional legislation.

PART III

Reviews the issue of consent to treatment, and the right to refuse treatment. The requirements of informed consent are set out and the substance of legislation to govern consent issues is examined.

PART IV

Addresses the issue of force-feeding and attempts to resolve the ambiguity which faces both correctional administrators and inmates in force-feeding situations.

PART V

Examines the changes that would be required in legal rules to ensure that mental health needs of offenders are taken into account at such critical points as placement, classification, transfer, disciplinary proceedings and parole release or mandatory supervision decisions.

PART VI

Examines the issue of transfer of mentally disordered federal inmates to provincial health facilities, and reviews options for dealing with the problem.

PART VII

Reviews issues related to confidentiality of medical records and the inmate-patient's right to know what is on his or her own file, and the concern that arises when the doctor's ethical responsibility regarding confidentiality and the patient's interest in keeping matters private conflicts with the professional need to share information, or with the institutional or public interest in being forewarned about risks of patient "dangerousness".

INTRODUCTION

This Working Paper is one in a series of papers produced by the Correctional Law Review. *A Framework for the Correctional Law Review* (June, 1986) set out the constitutional and legislative framework governing the prison and parole system, outlined the relevance of certain international laws and treaties, the influence of case law, the potential impact of the *Canadian Charter of Rights and Freedoms* and considerations affecting decisions to review the current legal framework. This paper carries forward several of the themes raised in that paper and discusses questions surrounding mental health services for federal inmates that can be addressed in federal correctional legislation.

The immediate context of this paper is the policy framework for the Criminal Law Review as a whole which was developed in *The Criminal Law in Canadian Society*[1], together with the first two Working Papers of the Correctional Law Review (*Correctional Philosophy* and the *Framework* Paper mentioned above). In a broader perspective this paper reflects the concerns of a number of reports or studies dealing with mental health needs and programs at the federal level.[2]

The issues surrounding mentally disordered inmates are particularly complex. The purpose of this paper is to provide an up-to-date description of the mental health needs of inmates and the services currently available, and, most importantly, to discuss issues that can be addressed in correctional legislation.

It is not intended that the paper will deal with all the mental health service delivery problems that face the system, but rather that it will examine the narrower issue of what federal correctional legislation can do. The problems of mental health services cut across both our health care and criminal justice systems. However, given the mandate of the Correctional Law Review, the focus of this paper is necessarily a limited one. Although the paper contains a discussion of the larger problems surrounding mental health services, and points to the need to address service delivery and operational problems, it does so to provide the context within which the narrower questions (such as right to treatment and confidentiality of records) that are amenable to federal correctional legislation, can be addressed. At the same time, the broader operational issues are being dealt with by way of a major project currently being carried out within the Correctional Service of Canada (CSC).

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[1] *The Criminal Law in Canadian Society*, (1982) (Ottawa: Government of Canada).

[2] The Archambault Report (*Report of the Royal Commission to Investigate the Penal System of Canada*, King's Printer, Ottawa, 1938) noted that there was "neither means for proper treatment nor personnel with experience" to deal with the insane prisoner; the McRuer Report in 1956 (*Report of a Committee Appointed to inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice Canada*, Queen's Printer, Ottawa, 1956) counselled that "wise institutional treatment takes into consideration the education and the physical and mental health of the prisoner"; and the Ouimet Report in 1969 (*Report of the Canadian Committee on Corrections*, Queen's Printer, Ottawa, 1969) urged that "within the scope permitted by the sentence of the court, the discretion allowed by law, and the demands of food professional practice" the prison service should take whatever course of action was necessary to return the offender to the community as a contributing member of society". The Carson Committee Report of 1984 (*Report of the Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions*, Ministry of the Solicitor General, 1984) recommended that steps be taken to effectively deal with the growing problem of mentally disturbed offenders.

Part I of this paper attempts to put the whole mental health services issue in context by providing a sense of the problem in broad terms; by setting out necessary definitional and statistical data, as well as outlining the current structure for delivery of mental health services to penitentiary inmates, and by discussing the critical issue of jurisdiction.

Parts II to VII address issues in developing legislation to govern mentally disordered inmates; examined are issues related to a right to treatment and the nature and scope of such a right, the right to refuse treatment, force-feeding, transfers to provincial facilities, confidentiality or, medical/treatment records, and the implications of these matters in regard to institutional decision-making Reference is made to the *Canadian Charter of Rights and Freedoms* and its, impact upon the mental health needs of inmates. At the conclusion of each section, proposals as to what should be contained in federal corrections legislation have been made to generate discussion. These proposals are consistent with the approach developed in the *Framework* Paper, which examined the reasons why matters governing inmate rights be specified in statute or regulation.

One reason is that legislative provisions are particularly important where the *Charter* is concerned. Because the *Charter* is drafted in general, abstract terms, legislative provisions play a crucial role in articulations and clarifying *Charter* rights and any restrictions on them that are necessary in the corrections context. This latter point is most significant, as limitations or restrictions on *Charter* rights must be "prescribed by law", and it appears, that limitations in policy directives may not be consistent with the *Charter*'s demands.

In addition, development of legislative provisions at this time appears vastly preferable to a future of incremental and potentially inconsistent change forced upon the correctional system by the courts. Although judicial intervention plays an important role in providing outside inspection and scrutiny, the courts should be relied on as a last resort, rather than a first measure. In short, there is a need for legislative provisions to be developed in a way which does justice to all participants, in an effort to improve their collective enterprise. Litigation, in contrast, results in a win or loss for one side or the other, and often results in maximizing polarity.

In considering long-term solutions, the need to resort to the courts should be avoided by developing legislative rules that recognize yet structure discretion consistent with principles that are understandable to inmates, prison staff and administrators, and the public. Legislative rules that are based on clearly stated principles and objectives would structure discretion to allow for the necessary degree of flexibility while ensuring the greatest possible degree of accountability.

It should be noted that the proposals in this paper do not represent the government's position, as no decisions have been taken concerning appropriate legislation. At this stage, the proposals are intended to raise issues for discussion and consultation. The government is not committed to a particular course of action, but is actively soliciting public and professional input before a final determination is made.

Before setting out the dimensions of the mental health services problem it is useful to discuss the meaning of "mental health services" as used in this paper. It is important to understand not only what the term means to correctional and professional staff working with inmates, but also what sorts of illnesses or disorders are included in the term and what types of treatments or programs are contemplated. "Mental health services" as used in this paper includes services for severe psychiatric illnesses such as those that are susceptible to acute, sub-acute or chronic long-term care, as well as, severe behavioural disorders. This paper relies on the classification and terminology used in the *Mental Disorders Needs Identification Study*[3] carried out by the Ministry of the Solicitor General (see *Appendix B*). Although the classification and definitions set out in that study may be subject to criticism, they do provide a basis for discussion. It will be appreciated at once that "mental health services" is not confined to services for recognized psychiatric illnesses; moreover, the term implies reliance on a wide range of professionals including medical, nursing, psychological and chaplaincy personnel.

In 1972 when the Chalke Report[4] recommended the construction of regional psychiatric centres, the focus of attention was on (1) psychiatric illness of an acute nature (such as psychosis, severe depression, panic attacks, confusional states or toxic reactions) requiring medical treatment in a hospital for up to 60 days, (2) sub-acute psychiatric illnesses, as above, but requiring treatment for more than two months, and (3) chronic patients including those suffering from schizophrenia, epilepsy, organic brain damage, or mental retardation, and requiring continuing care.

However, there is a large group of inmates suffering not from acute or chronic psychiatric illnesses but from severe behavioural disorders or other deficiencies. Included in this category are persons suffering from severe (1) alcohol or drug problems, (2) sexual dysfunction, (3) violence or aggression control problems, (4) stress management deficiencies, (5) depression other than above, (6) thought disorders of a non-acute type, and (7) lack of life skills or other social/cultural skills.

Treatment of the acutely ill has generally been by way of drug therapy under medical supervision, either within the penitentiary health service or on transfer to a provincial facility. Behavioural disorders or deficiencies, by contrast, tend to be approached from a therapeutic/ counselling/education perspective, frequently in the form of group sessions. Treatment, programs, and services are found to be useful at the pre-release stage in the institution as well as after release on parole or mandatory supervision in the community. To date, an emphasis has been given to treatment of severe psychiatric disorders. The Carson Report,[5] the Nielsen Report,[6] and the Needs Identification Study[7] suggest that there is an increasing demand for mental health services for behavioural disorders as well as for psychiatric illnesses. In addressing mental health services for penitentiary inmates, the concern is not simply that the "certifiably insane" be separated from the general prison population, nor is it just that the acutely ill be given psychiatric treatment and care. The concern now is also that the large category of inmates with behavioural disorders be given proper treatment. Group programs of a therapeutic-educative nature can be delivered, and if they're not provided, the individuals concerned, their follow inmates, and the staff of the penitentiaries may suffer stress and unnecessary violence.

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[3] T. Hogan and L. Guglielmo, *Mental Disorder Needs Identification Study*, Ministry of the Solicitor General, 1985.

[4] *The General Program for the Development of Psychiatric Services in Federal Correctional Services in Canada*, Ottawa, 1972. (The Chalke Report).

[5] *Report of the Advisory Committee of the Solicitor General of Canada on the Management of Correctional Institutions*, *Supra* Note 2. (The Carson Committee Report).

[6] *Improved Program Delivery. The Justice System*, A Study Team Report to the Task Force on Program Review,

As with psychiatric care and treatment, there is no guarantee that such programs provide a "cure" for recidivism. However, access to both psychiatric and therapeutic-educative programs is consistent with the statement of purpose of corrections set out in the *Correctional Philosophy* Working Paper, which places high priority on encouraging offenders to prepare for eventual release and successful re-integration into society through the provision of a wide range of program opportunities responsive to their individual needs. A large number of offenders come into the correctional system with multiple problems, including psychiatric and behavioural disorders, which may contribute to their criminality. Society and the correctional system want to help the offender deal with these problems.

Providing programs, however, raises questions of resources. In an era of economic restraint, it must be recognized that the larger, and perhaps most intractable, issue is that of resource allocation. Yet at the same time the provision of needed mental health services has been identified as a priority by CSC and by various studies and reports on corrections.

Ottawa, 1985.

[7] *Supra*, Note 3.

PART I: DIMENSIONS OF THE MENTAL HEALTH SERVICES PROBLEM

At the risk of oversimplification, the problem for the correctional system is that increasing numbers of offenders in federal penitentiaries have serious psychiatric illnesses or are suffering from a range of serious behavioural disorders.[8] Lack of sufficient treatment or other services for such offenders, who constitute 25% or more of the inmate population of some federal penitentiaries, gives rise to violence, stress, and crises that are damaging to the offender concerned and to other inmates. Moreover, the failure to address the basic human needs of so many inmates creates a debilitating and demoralizing work environment for staff and management.

The Carson Committee commented on the need for mental health services and the inadequacy of present services:

> We think that this situation is seriously straining the mental health resources of the Service. We heard concerns that disturbed offenders disrupt the normal functioning of institutions, can irritate and provoke other inmates, and that they generally interfere with the delivery of programs because of the excessive attention they demand from staff.
>
> Estimates of the proportion of inmates who suffer from some form of serious mental disturbance range up to 25 per cent. Although several specialized regional facilities are available, only the most chronic cases can be accommodated on a long-term basis. Most cases must be quickly returned to their home institution. We are concerned that seriously disturbed individuals will be even more disrupted by such "bus therapy" that does not attend to their underlying problems in a systematic fashion. Administrative segregation often becomes the only possible means of managing these individuals within a regular institutional setting.
>
> A further problem is that the Service's psychiatrically oriented facilities are hesitant to treat inmates who are not clearly mentally ill or who are particularly disruptive. There are many offenders who fall in the uncertain border between normalcy and mental illness, but who display both severe mental and behavioural problems. Greater attention needs to be focused on ways to provide services for this marginal population.[9]

The problem, then, is of importance at various levels: at the individual level there is a right to have basic health needs met; at the administrative level, taking care of the basic mental health needs of inmates enhances the working environment of staff and the effective and efficient management of the prison; for the community, taking seriously the mental health needs of offenders promotes security and respect for the basic human dignity of persons generally; and at the national and international levels, providing for offenders' basic health care needs fulfills the requirements of law and international obligations, and contributes to a more safe, secure and humane society.

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[8] Most of the data referred to in this section is taken from *Operational and Resource Management Review No. 11, Review of Mental Health Services*, Ministry of the Solicitor General, Ottawa, 1985.

[9] *Carson, Committee Report, supra*, note 2, at p. 49.

THE SIZE AND NATURE OF THE PROBLEM

A large proportion of the federal penitentiary population is in serious need of mental health services. As indicated above, these needs fall into two categories. Recent estimates are that about 15% of the federal prison population suffer from a serious psychiatric illness of an acute, sub-acute or chronic nature, and an additional 20 - 30% suffer from serious illnesses or behavioural disorders that do not require medical treatment in a hospital. These illnesses and disorders include (1) violence and aggression including significant problems in handling extreme anger, (2) serious sexual dysfunction; (3) mental/social incompetence, including mental retardation and difficulty in coping with everyday life without causing serious administrative problems in the prison; (4) suicidal tendencies; (5) serious depression; and (6) thought disorders and milder depressions responsive to treatment without hospitalization.[10]

It should be noted that the population identified as being in need of mental health services does not include the category of inmates who suffer from serious alcohol or drug abuse, although many inmates may fall within both categories. When prisoners with a serious problem in this regard are included, the percentage of the federal prison population in need of mental health services almost doubles in every region. It should also be noted that specific figures are difficult to interpret, due to the fact that many inmates suffer from multiple specific behaviour disorders, and different studies deal with this problem in different ways. CSC is currently undertaking a needs identification study which will produce current figures on the magnitude of the problem and clear up any ambiguity which may have arisen through comparison of figures from different studies carried out in the past. The results of the CSC study are expected to be available in the Fall of 1988.

What health services are currently provided? Latest CSC figures indicate that there are approximately 1500 federal inmates suffering from an acute, sub-acute or chronic categories of mental disorder. CSC has a total of 455 beds for both psychiatrically and behaviourally disordered inmates - nearly 300 for acute, sub-acute and chronic illnesses, with the remainder for inmates with special problems such as those who are sex offenders or those with personality or behaviour disorders.

These figures, as well as the *Needs Identification Study and Operational and Resource Management Review No. 11, Review of Mental Health Services*,[11] indicate that there are far more incarcerated offenders in need of mental health services than are currently being treated. In addition, problems remain in the delivery of health services to inmates on parole, mandatory supervision and the large proportion of inmates currently estimated to be suffering from one or more behavioural disorders.

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[10] *Supra*, Note 8.

[11] *Supra*, Notes 3 and 8.

To address behavioural disorders, various treatment-oriented or educational programs are offered, in both regional psychiatric centres and penitentiaries, with a specialized focus such as alcohol abuse, drug abuse, how to handle aggression and anger, sexual dysfunction, and life skills. In particular institutions, when inmates who suffer from substance abuse are included, up to 60% of the population is said to be in need of such mental health services. The *Nielsen Task Force Report on The Justice System* commented on the problem in these terms:

> Although it is sometimes suggested that penitentiaries should cease trying to fulfill aims beyond punishment and incapacitation, the study team has concluded that the other efforts which go on inside the penitentiary (although some could be done more effectively and efficiently) are justified, and their abandonment would be irresponsible on government's part.
>
> People who end up in prison present a multiplicity problems (sic): 40 per cent are functionally illiterate; at least as many have a drug or alcohol dependency; and most have few marketable skills and a history of sporadic employment; many have learning disabilities, poor social skills, family problems, a low maturation. A few have severe mental disorders but cannot be accommodated by the mental health system. Far from concluding that the effort to deal with these problems is a "frill" which cannot be justified in an era of restraint, the study team finds that discouragingly little is being done about these problems.[12]

Another factor bears further investigation. Relying largely on American analysis, the suggestion is made that in recent years the mentally disordered are being "criminalized". The argument is that with the closing down of large psychiatric institutions and the treatment of mentally ill persons in community-based facilities or on an out-patient basis, more and more mentally ill offenders, instead of being diverted into the health care system, are being diverted into the prisons. While it is difficult to make an absolute judgment about the so-called "criminalization" of the mentally disordered, it is clear that further empirical evidence is needed.

JURISDICTION

A fundamental question arising from the problem of providing mental health services for penitentiary inmates is one of responsibility or jurisdiction of the federal and provincial governments. Two issues arise: (1) whose responsibility is the provision of service, and (2) what can or should be done about the regional inequality of services which is caused by variations in the health services provided at the provincial level.

The issues are important and complex, but for the purposes of this paper it is accepted that health care, including mental health, is the constitutional responsibility of the provinces. However, the federal government has the constitutional responsibility for penitentiaries and thus the custody and care of all inmates received into penitentiary. (Section 16(l) of the *Penitentiary Act* provides for a period of time - usually 30 days -

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[12] *Supra*, note 6, at p. 287.

during which inmates sentenced to two years or, more remain in provincial custody to permit them to file an appeal unless they waive their right to do so).

The Ouimet Committee stated in 1969, and it has remained true, however, that

> there are instances where provincial authorities flatly refuse to accept for treatment mentally disordered inmates from the penitentiary. The theory of the officials who do not wish to accept these inmates for treatment is based upon the proposition that the penitentiaries should provide their own mental health services. It is more important that all available services be employed to their fullest extent than individuals to suffer severely because one governmental agency insists that the responsibility lies with another governmental agency. The Canadian Committee on Corrections recognizes a need for the federal government to provide additional resources.[13]

Accordingly, the Regional Psychiatric Centres (RPC) were set up during the 1970's in order to fill gaps in available provincial service for federal inmates. Analogous provisions have been made for the Canadian Armed Forces and the RCMP.

Medical services have also been established in penitentiaries, through qualified professionals employed by the federal government or through purchase of service from the private sector.

Some disagreement over who should pay arises from the joint federal-provincial medicare scheme and the various provincial health acts under which "residents" of a province are entitled to receive "insured services" at no cost. For example, the British Columbia *Mental Health Act* states that every resident of the Province is entitled to receive service and accommodation in the facilities created pursuant to the *Act*. Are penitentiary inmates "residents" of a province for the purpose of the *Mental Health Act* and medicare legislation? The Alberta *Health Care Insurance Act*, for example, appears to exclude penitentiary inmates From Alberta Medicare and excludes, as well, members of the RCMP and the Armed Forces. The *Canada Health Act* expressly exempts from medicare legislation "a person serving a term of imprisonment in a penitentiary as defined in the *Penitentiary Act*." It would seem therefore, that Federal authorities must pay for medical services for penitentiary inmates independent1y of provincial medicare scheme. This is also true of offenders on day parole, who are deemed to be serving their sentence in penitentiaries. Offenders in the community on parole and mandatory supervision, however, are covered by provincial medicare schemes.

In short, the federal government provides for the health care needs of persons sentenced to penitentiary terms. If the federal government feels that it could provide health care services to Federal inmates more efficiently by having a certain range of medical services included under the medicare agreements with particular provinces, then that option is open to the federal government when the federal-provincial medicare cost-sharing agreement comes up for re-negotiation. Otherwise, the federal government can provide its own medical services or purchase them from the private sector. The issue would appear to be more a question of who pays and how the services are delivered than they are of jurisdiction *per se*.

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[13] *Ouimet Report*, *supra*, note 2.

The related issue of inequality of service is sometimes mixed with the jurisdictional issue. As can be seen above, especially on release, availability of public mental health services may vary from province to province. The same issue arises when an inmate is transferred to a provincial mental health facility. Penitentiary inmates in one province, for example, may have the benefit of a broader range of services than inmates in another province. Such provincial differences arise from differences in wealth and political priorities in the various provinces. However, the federal government's constitutional responsibility for penitentiary inmates is not altered by either parole release or transfer to a provincial health facility; such inmates remain under the jurisdiction of CSC until the expiration of their sentence. In meeting its responsibilities, CSC may have to consider supplementing provincial services in order to remove disparities for federal inmates.

HOSPITAL ORDERS

Proposed amendments to the *Criminal Code* pertaining to mental disorders provide for a court, at time of sentencing and with the consent of the Crown, the offender, and the hospital, to make hospital orders. The court would be able to order persons suffering from mental disorder in acute phase, for whom immediate treatment is urgently needed, to serve up to 60 days in a psychiatric facility.

Hospital orders present several issues that relate to costs, such as whether the federal government will cost-share any of the costs of the provincial administration of hospital orders imposed upon offenders who will eventually go to penitentiary. Such issues are beyond the scope of this paper.

PART II: RIGHT TO TREATMENT

The previous section described the present system of mental health service delivery and many of the problems which it faces. This section, and those following, narrows the focus to examine issues that can be addressed in corrections legislation.

In this section of the working paper the nature and scope of a "right to treatment" is examined and any basis in common law, statutory law or the *Charter* for a "right to treatment" is identified. The matters to be addressed are whether there is an obligation on the state to provide treatment and the extent of such an obligation. Also to be considered are the legal and practical limits confining any obligation to provide treatment and, finally, the degree to which a right to treatment should be specified in legislative form.

It is important to distinguish between a legal and a moral obligation to provide medical services to inmates. In everyday language we tend to use the term "rights" in several different ways. Sometimes we use "right" to refer to a claim that the courts will enforce, but often we use the term more loosely simply to assert a moral claim or a social expectation which does not have legal force in the sense that a court would enforce such a claim.

In law, right and duty are often converse sides of the same coin. Accordingly, where the individual offender has a right to treatment in the legal sense, it follows that the state is obliged, by virtue of a legal duty, to provide treatment. The failure to do so would give rise to a remedy in the courts or other appropriate tribunals. In this paper we are using "right" in the strict legal sense of the word.

RIGHT TO TREATMENT: PRE-*CHARTER*

Leaving aside for the moment the impact of the *Charter*, it appears that under the law there exists no substantive general "right" to health services. This may sound strange to Canadians covered by a system of medicare which provides universal access to a doctor irrespective of ability to pay. A perusal of the federal and provincial health acts, however, fails to disclose an express right to health services. The federal *Act* at first glance appears to grant a right by providing for federal payment of medical care in cooperation with the provinces. Section 10 of the *Canada Health Act* states that:

> In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred percent of the insured persons of the province to the insured services ..."

Section 12 of the same *Act* attempts to ensure universal access by banning "extra billing" for insured services. The question remains, however, whether removing financial and other barriers to a doctor's office thereby confers a "right to" medical services. An argument might well be made that requesting an appointment with a doctor does not give you a right to an appointment. The doctor is under no legal duty to see you.

In addition, both federal and provincial health care statutes expressly exclude certain classes of persons from coverage under the medicare scheme. As already indicated, persons "serving a term of imprisonment in a penitentiary" and members of the RCMP and the Canadian Forces are expressly left out. As a result, federal prisoners have no right to health care arising under general health legislation.

An exception to the fact that the law (with the possible exception of the *Charter*, discussed below) does not, in general, recognize a right to health services is drawn for persons who, because of age, infirmity or other reason, are under the care or guardianship of others. Indeed, the exception is deemed to be so important in guarding against abuses that parents, heads of families and guardians are under a duty to provide "necessaries" to children, spouses or other persons under their "charge" if that person, by reason of detention, age, illness or insanity, is unable to withdraw herself or himself from that "charge" and unable to provide herself or himself with the "necessaries of life." Breach of that duty under circumstances leading to death, or likely to endanger the life or cause permanent injury to the health of the person is a *Criminal Code* offence. These provisions have been interpreted to include providing such medical services as blood transfusions or insulin treatment.

To date, no prisoner has brought criminal charges against prison officials for failing to provide necessary mental health services. For one thing it may be difficult to prove "permanent injury". Moreover, the *Criminal Code* sections were drafted almost ninety years ago and seem to be more concerned with such necessaries as tend to preserve physical life than with necessaries in the sense of preserving mental health.

The present *Penitentiary Act* contains no specific right to health services. The *Penitentiary Service Regulations* (PSRs) do, however, contain the following:

Medical and Dental Care

> 16 Every inmate shall be provided, in accordance with directives, with the essential medical and health care that he requires.

The policy objectives of several of the Commissioner's Directives are of particular interest. The policy objective of CD-800, entitled *Medical, Dental and Health Care Services* is:

> To ensure that offenders are provided with medical, dental and health care services in keeping with generally accepted practices in Canadian society.

The policy objective of the CD on *Psychological Services* (CD-840) has as its policy objective:

> To ensure the provision of psychological services to offenders in order to assist them with the resolution of psychological problems and behavioural

> disorders and to help them learn and adopt socially acceptable behaviour patterns.

In addition, the policy objective of the CD on *Mental Health Services and Programs* (CD-850) is:

> To promote the mental health of offenders by ensuring appropriate and equitable access to professional mental health services, thereby contributing to offenders' adjustment within the institution and assisting them to become law-abiding citizens.

While the directives recognize the responsibility of CSC to provide mental health services to inmates, it is not accepted that the directives have the status of law in the same way as statutes and regulations do. The Supreme Court of Canada in its decision in *Martineau and Butters* (No.1)[14] said, that the directives in question are not 'law' and a court will not enforce them.

At the present time, whatever their legal status, the health care directives reflect the policy of the Correctional Service of Canada. That policy not only recognizes an implicit duty to provide medical care but it sets a standard of care, that standard being the range and quality of medical care available to the public at large.

RIGHT TO TREATMENT AND THE *CHARTER*

There can be no doubt that the *Charter* is having a profound effect upon Canadian law. To begin with, being a constitutional document, unlike the *Canadian Bill of Rights*, it is part of the supreme law of the land and confers a broad power on the courts to provide remedies. These remedies include the ability of the courts to strike down legislation that is found to be in breach of *Charter* rights and freedoms. In relation to prisoners, the *Charter* has already had important effects on parole procedures, prison transfer decisions and other administrative procedures affecting inmates' constitutional rights.[15]

Courts have stressed that the *Charter* is aimed at promoting respect for the dignity of persons and at upholding the ideal of a person as a rational autonomous individual with a capacity for making individual choices. This respect for individual conscience and judgement lies at the heart of our democratic political tradition.[16] Consistent with those traditions, the rights and freedoms outlined in the *Charter* are not absolute; section 1 of the *Charter* states that a right or freedom may be limited by law. But the section goes on to set a standard against which such limits must be justified.[17]

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[14] *Martineau v. Matsqui Inmates Disciplinary Board (No. 1)*, [1978] 1 S.C.R. 118

[15] The impact of the *Charter* is discussed in further detail in the Working Paper on *Correctional Authority and Inmate Rights*.

[16] *R. v. Big M Drug Mart et al.*, [1985] 1 S.C.R. 295 at p. 346.

[17] The test is set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103.

With respect to mental health services for inmates, section 7 (life, liberty and security) and section 1 are of major importance. In addition, section 12 prohibits "cruel and unusual treatment or punishment" and section 15 prohibits unequal treatment or discrimination. Each of these provisions will be discussed in regard to impact on a right to treatment and its scope.

LIFE, LIBERTY AND SECURITY OF THE PERSON

The principal *Charter* provision for present purposes is section 7 which states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Although not yet settled, these words have been given a broad meaning by several lower courts so that the right to life would embrace more than bare physical survival and include life of at least a minimal level of decency in Canadian society.

If there is a right to treatment, and conversely, an obligation to provide treatment under the *Charter*, what criteria define the scope of the obligation or right?

What is most problematic is the range of health services that may fall within section 7 and the degree to which they must be provided by the correctional system. The scope of the right to "life" or "security of the person" in terms of mental health services may be interpreted by the courts to cover psychiatric care and treatment for acute, sub-acute and chronic cases as well as mental health or therapeutic services for other disorders.

CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

There is a relationship between arbitrary imprisonment and cruel and unusual punishment or treatment, as prohibited by section 12 of the *Charter*. Aspects of cruel and unusual punishment include arbitrary or capricious punishment, wanton and unnecessary punishment, punishment without rational penological purpose, and disproportionate or excessive punishment. Since these conditions of punishment can be equally applicable to treatment, it gives some indication of what types of treatment and of which failures to offer treatment may be unconstitutional.

While section 12 of the *Charter* clearly states that treatment cannot be cruel or unusual, higher Canadian courts have not as yet interpreted the section in the present context. Some assistance can be gained by looking at the American counterpart to section 12. The United States Supreme Court has said that a failure to provide treatment does not constitute cruel and unusual punishment unless the failure showed "deliberate indifference to serious medical needs of prisoners," such deliberate indifference constituting "an unnecessary and wanton infliction of pain."[18] The American courts look for a series of incidents[19] or a pattern of neglect rather than an isolated incident. In addition, a "totality of the circumstances" test is used in finding wanton neglect. A pattern of repeated examples of negligent acts or proof of systemic gross deficiencies in staffing, facilities, equipment or procedures are looked to as evidence of wanton neglect.

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[18] *Estelle v. Gamble*, (1976) 50 L.Ed. 2d 251 (U.S.S.C.), at p. 260.

[19] *Robert E. v. Lane*, (1981) 530 F. Supp. 930.

EQUALITY OF TREATMENT

Having argued that there may be a right to treatment and an obligation to offer treatment, what implications might follow in terms of equal access to services?

Prior to the *Charter* the problem was viewed as a moral one, dependent for its solution on the political will of governments to provide needed resources, both human and financial. The common law provided no legal remedy by which to enforce a moral expectation of equality under law. While statutory enactments that followed the horrors of World War II prohibited discrimination based on race, colour, religion and other proscribed status or conditions, they conferred no general legal right to equality under the law.

Beyond the common law and human rights legislation, the *Canadian Bill of Rights* purported to guarantee equality before the law. The courts, however, interpreted the *Bill* narrowly, holding that it was enough if the law was applied equally in its administration; the *Bill* was construed as permitting the Courts to turn a blind eye to distinctions between groups or classes, providing there was some valid legislative objective in drawing the distinction. On this basis only arbitrary, capricious or irrational distinctions could be found to be invalid.

The equality provisions of the *Canadian Charter of Rights and Freedoms* were carefully drawn to overcome these earlier gaps in the law. The *Charter* mandates not simply equality before the law but also "under the law", as well as equal protection of law and equal benefit of the law:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Issues raised by these new requirements for equal treatment under the law are several. First, there may be a concern over exclusion of federal inmates from the medicare legislation, as indicated above. Second, is differential access to services including those services offered to federal offenders released on day parole as opposed to those on full parole or mandatory supervision, now prohibited? This problem arises because, as indicated above, persons released on full parole and mandatory supervision, being regarded as "residents" of the province, are shifted over to Provincial medicare schemes for health services; day parolees are not. Moreover, since a number of provinces do not include psychological services as an "insured service" under medicare, some prisoners on release have access to needed therapeutic programs while others do not unless the federal government purchases such services from the private sector. Third, does the *Charter* prohibit differentiation in treatment within the prison, such differences not being dependent upon different classes of parole release?

Without going into detail, it is possible to speculate on whether excluding federal inmates from medicare legislation violates the *Charter*. It is unlikely that the courts will prevent governments from making that kind of distinction in delivery of health care services. To find otherwise, the court would have to be persuaded that the distinction, considering its purposes and effects, is unreasonable, unfair and unjustified.[20]

The second issue, variability in availability of health care services based on the status of the offender (i.e. whether on day parole with access to federal institutional programs or on full parole or mandatory supervision and eligible for provincial community-based services) may also invite litigation under section 15. The argument here is that both groups of inmates are "similarly situated" and that their status is not a legitimate basis for making injurious distinctions. Again the purpose and effects of the distinction will be assessed, for not every distinction is a violation of section 15; indeed, to fail to draw distinctions in some cases may be discriminatory. In making its analysis, the court will be asked to consider whether the purposes behind the distinction could have been achieved by some reasonable alternative so as to avoid any injurious effects.

Distinctions based on residence or region may also raise questions under section 15. For example, if a wider range of after-care health services are available to offenders in the custody of CSC in Ontario than to those in British Columbia, does this violate *Charter* rights under section 15? Does the *Charter* require uniformity of services regardless of province or region where the responsibility is a federal one?

Is it permissible for the federal government to fail to provide basic mental health services in one institution or region when such services are available in other institutions or regions? Distinctions based on region or area of residence alone may raise concerns. Again, the purpose and effects of the distinctions will have to be assessed.

INTERNATIONAL OBLIGATIONS AND STANDARDS

International treaties and statements of standards for prisons have long addressed the state's obligation to provide basic services to prisoners. The *International Covenant on Civil and Political Rights*, to which Canada is a signatory, states in Article 10 that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

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[20] *Andrews v. Law Society of British Columbia*, (1986), 2 B.C.L.R (2d) 305 (B.C.C.A.) (on appeal to the S.C.C.) and *Rebic v. A.G.B.C.*, (1986), 2 B.C.L.R. (2d) 364 (B.C.C.A.)

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

While the *Covenant* is not, in its present form, part of the domestic law of Canada, courts are bound to resolve ambiguities in law in favour of an interpretation that is consistent with international obligations.

Canada feels obliged to conform to the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, although these are not part of our domestic law. It is useful to note *Rule 62*:

> The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.

Other *Rules* provide for the removal of "insane" prisoners to mental health facilities and for the treatment of prisoners with "mental diseases or abnormalities" in specialized institutions. While some disagreement may be expressed with regard to the detail of the *Rules*, including their narrow focus on medical and psychiatric treatment instead of a broader therapeutic approach, the expectation is that something positive be attempted in the way of offering mental health services to prisoners.

The set of standards developed by the Canadian Criminal Justice Association and CSC for Canadian prisons contemplates a broad range of mental health care services for prisoners, but the specific standards tend to focus on psychiatric services on-site with reliance on transfers out to "appropriate" mental health facilities in cases of "severe emotional disorders."

OTHER FACTORS

The scope of a right to treatment can also be defined to some extent by addressing questions such as "what type of need leads to a right to treatment?"

In the absence of relevant Canadian case law, it is useful to look at the leading American case of *Bowring vs Godwin*[21] as it may provide guidance in developing Canadian law. In that case the court held that the prisoner was entitled to psychiatric or psychological services. The case is useful in identifying positive factors helpful in determining whether treatment ought to be granted. Those factors include a consideration of availability of any suitable treatment programs that are known to be effective in treating the disorder:

> "We therefore hold that *Bowring* (or any other prison inmate) is entitled to psychological or psychiatric treatment if a physician or other health care

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[21] *Bowing v. Godwin*, (1977) 551 F. 2d 44.

provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial."[22]

The language of the *Bowring* test has been criticized as covering only "blatantly obvious" abnormal behaviour and excluding disorders discoverable only on psychiatric or psychological evaluation. Moreover, *Bowring*'s insistence that the disorder be "curable" or "substantially alleviated" appears to leave chronic disorders outside the scope of the rule. Finally, the requirement that there be a risk of "substantial harm" upon failure to provide services may leave untouched disorders leading to progressive psychic deterioration and catch only foreseeable physical harm, a gap that ought to be closed.

Nevertheless, the *Bowring* case is helpful not only in suggesting criteria that set justifiable limits on the right to treatment, but in addressing as well the question of who makes the decision as to treatment. Clearly, *Bowring* does not impose a duty on doctors to give treatment on demand; rather, the right to treatment is no more than a right of access to treatment, with the final decision firmly resting in medical hands as it does in relation to the public generally. This is the current practice in CSC under the Commissioner's Directives.

A related issue concerns whether a right to treatment includes a right to a second opinion by outside psychiatrists or other mental health professionals of the inmate's choice. Second opinions are recognized as a valuable measure and are available to the community at large. The Canadian Medical Association Code of Ethics states that:

> 5 An Ethical Physician will recognize that...the patient ... has the right to request of that physician opinions from other physicians of the patient's choice.

This right is particularly important in the prison context, where the patient cannot simply go to another doctor at will.

Even though recognition of a right to a second opinion could mean a significant cost burden, it appears necessary to ensure that health measures that are provided in the community are available to inmates within an institution. Nonetheless, it may be argued that in an institutional environment, limits of some sort should be placed on access to second opinions. In order to avoid any abuse that may arise through frivolous claims to a second opinion, present CSC policy imposes a limit. CSC pays for a second opinion where the institution's health professionals, or the Regional Manager of Health Services, are of the view that it is a legitimate demand; otherwise, an inmate can have a second opinion only if he or she pays for it. This does mean that inmates with sufficient resources will be able to purchase additional medical services. On the other hand, it can be argued that these services have been identified as unnecessary by qualified medical personnel who are governed by professional standards of medical care, including the CMA provision with respect to second opinions quoted above.

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[22] *Ibid.*, p.47.

An important question for discussion is therefore whether inmates should have an unqualified right to a second opinion, as set out in our proposal or whether limits (and the extent of such limits) should be placed on such a right in an institutional context.

And finally, in attempting to define the extent of a right to treatment, regard must be had to, amongst other things, public expectations and professional standards of proper treatment. This includes knowing the level of professional competence and expertise in the area of concern. It may well be that public expectations respecting mental health services and treatment exceed current medical expertise, with resultant moral, ethical and legal difficulties.

Undoubtedly, the public has an expectation that inmates suffering from sexual dysfunction, emotional disorders, severe stress and aggression management problems, for example, should be offered treatment. Institutional management, too, often looks to psychiatrists, psychologists, and others for assistance in making transfer, disciplinary and release decisions involving persons with behavioural or mental disorders. Some judges, as well, feel that it is "not safe" to make a sentencing decision without appropriate psychiatric, psychological or medical reports. Society and the official prison bureaucracies look to the health professions as an aid not only in protecting society but also in bettering prison/parole management and as a means of doing something constructive for the inmate. The call for mental health services is clear, yet the limitations of both psychiatry and psychology in delivering the expected product is well documented. Whatever the content of an obligation to treat may be, it cannot exceed current levels of professional competence. It will be useful to review the limits of professional expertise as a relevant factor in determining the content of a right to treatment.

The problems with reliability of professional decision-making in relation to rehabilitative services have been well documented in a series of impressive reports over the last decade. Webster's *Deciding Dangerousness: Policy Alternatives For Dangerous Offenders*[23] reviews the current state of the art with particular reference to psychiatry. It is not simply a problem of unreliable prediction, however; there is a problem of differing views as to appropriate criteria indicative of a specific illness or disorder, such criteria differing in part by reason of professional training or viewpoint.[24] Given problems of categorization or classification, it is not surprising to find considerable variation in diagnoses as well. Moreover, in general, there is little demonstrated reliability in treatment programs. In 1981, in the United States, the Panel on Research on Rehabilitation Techniques reported that "the search for rehabilitative techniques and programs has borne little fruit". The

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[23] C. Webster and Bernard Dickens, *Deciding Dangerousness: Policy Alternatives for Dangerous Offenders*, (1983) (Ottawa: Department of Justice).

[24] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd, 1980 (DSM-III).

Panel went on to urge continuing efforts to find effective treatments for prisoners but warned against basing social policy upon an assumption of rehabilitation.[25]

Given the many uncertainties to be faced in the delivery of mental health services and programs, there is a need for the careful, systematic formulation of programs based on the best professional judgment. The objectives are reliable programs and treatments of benefit to the inmate and, ultimately, to society, under conditions which respect the inherent dignity and autonomy of the person. The proposals presented throughout this paper attempt to provide a legal framework that will allow these objectives to be accomplished. The first step in this regard would be defining a right or obligation respecting mental health services in federal corrections legislation. It should be noted that these proposals are set out to generate discussion about what such legislative provisions should look like, what degree of specificity is appropriate, and what impact such proposals might have on correctional operations.

(i) Federal correctional legislation should explicitly recognize that the Commissioner of Corrections has a duty to provide needed mental health services to offenders within the custody of Correctional Service of Canada. The determination of mental health service needs shall be made by authorized medical staff or health services teams. This determination should be subject to an offender's right to request a second opinion.

(ii) "Mental health services" should be defined in federal correctional legislation to mean any approved treatment, program or service professionally designed and administered for the treatment of a mental disorder of thought, mood, perception, orientation, or memory that significantly impairs judgement, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life.

(iii) Federal correctional legislation should provide for an obligation to offer mental health services to persons in the custody of Correctional Service of Canada at a level or standard that is consistent with standards commonly available to the public at large, and to offer programs to meet the special needs of inmates.

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[25] Lee Sechrest et al, *The Rehabilitation of Criminal Offenders: Problems and Prospects*, National Research Council, National Academy of Sciences, Washington, D.C., 1979.

COMMENT

The definition of mental disorder includes but goes beyond psychiatric disorders, and contemplates resort to a broad range of mental health resources, including psychological, nursing, educational, and chaplaincy. The definition is derived from the proposed *Uniform Mental Health Act*. While our definition covers a wide range of illnesses and behavioural disorders, it is limited to those that "significantly impair".

PART III: CONSENT TO TREATMENT

Accepting that there is a duty to provide treatment, then, is there a reciprocal duty to submit to such treatment or is consent necessary? In reviewing the issue of consent to treatment, or the right to refuse treatment as it is sometimes called, reference will be made to common law and constitutional principles, to international standards, and to codes of professional ethics. The requirements of informed consent (or, conversely, waiver) at common law will be set out along with an outline of relevant exceptions to the common law principle. This section will close with an examination of the substance of legislation to govern consent issues.

The common law and the *Charter* both recognize that each individual enjoys a right to be free of unnecessary and unjustifiable state interference. Each person has a right to inviolability of the person and to integrity of the person. These values are reflected in the *Criminal Code*, (for example, the crime of assault) and in the civil law through an action in damages for battery, trespass, or other injury to the person. The law provides a remedy for negligence against doctors or others who undertake surgery or other medical trespasses upon the person that go beyond the patient's instructions or consent. Inmates are entitled in general to equal protection and benefit of the law; neither the common law nor the *Charter* excludes them from the general law regarding consent to treatment. The right to be left alone includes the right to refuse treatment or to discontinue treatment once given. The basis of the right has been said to be rooted in a right to privacy, or in some cases, freedom of thought, conscience, or religion.

The common law and the *Charter* reflect a respect for the dignity of persons, for the person as an autonomous individual with a capacity to choose and a responsibility for his or her own decisions and actions. The *Charter* reflects these values either expressly or implicitly in various sections but particularly in section 7, the guarantee of right to security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice. As discussed previously, section 1, while authorizing limitations on rights, requires such limits to be prescribed by law, as well as to be reasonable and demonstrably justified in a free and democratic society.

Existing CSC policy, contained in CD 803 *Consent to Medical, Dental and Psychiatric Treatment*, recognizes the principle of informed consent. The Law Reform Commission of Canada in its various reports relating to dispositions and sentences,[26] health services, and consent to medical care[27] has invariably re-affirmed the general principle of informed consent as a requirement of law:

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[26] See Law Reform Commission of Canada, Report: Guidelines to Dispositions and Sentences in the Criminal Process, (1976) Ottawa.

[27] Law Reform Commission of Canada, *Behaviour Alteration and Criminal Law*, Working Paper 43, (1985) Ottawa and *Consent to Medical Care* (1980) Ottawa.

To ensure the protection of the person, all laws, whether federal or provincial, require that informed and free consent be given before any treatment is undertaken.[28]

However, with few exceptions, the principle of informed consent is not expressly set out in legislation. Some provinces, do not address the issue of consent at all, and to the extent that they do so it is usually under the mental health acts providing for compulsory commitment and treatment under certain conditions. An exception to the general absence of legislative direction is found in Quebec where the *Civil Code* recognizes the principle of inviolability of the person and the principle of consent to treatment. Unlike other provinces' laws, the *Quebec Civil Code* also creates a duty, binding on all persons, to assist in preserving life in cases of emergency. This principle is of relevance because of its potential as a springboard for imposing treatment without consent in certain cases as outlined below.

Professional codes of ethics also recognize the principle of informed consent. The Canadian Medical Association Code of Ethics states as follows:

> 5 An Ethical Physician will recognize that the patient has the right to accept or reject any physician and any medical care recommended to him. The patient having chosen his physician, has the right to request of that physician opinions from other physicians of the patient's choice;
>
> 14 An Ethical Physician will, when the patient is unable to give consent, and an agent is unavailable to give consent, render such therapy as he believes to be in the patient's interest.

Provincial psychological associations also call for informed consent.

A factor that has received attention in the past in relation to consent is experimentation. International covenants and treaties, professional codes of ethics and the common law have all warned about the risks to human dignity and liberty arising out of medical experimentation. The leading Canadian case of *Halushka v. University of Saskatchewan*[29] involved a university student who suffered substantial injury after 'agreeing' to partake in an experiment for a sum of money. The court insisted on a standard of full disclosure of risk as a pre-condition to a valid consent.

The Canadian Medical Association's Code of Ethics expounds a similar standard:

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[28] *Behaviour Alternation and Criminal Law*, *supra*, note 27 at p.24.

[29] *Halushka v. University of Saskatchewan*, (1965) 53 D.L.R. (2d) 436 (Sask. C.A.).

Clinical Research

> 17 ... (the doctor) will, before initiating any clinical research involving human beings, ensure that such clinical research is appraised scientifically and ethically, and approved by a responsible committee, and is sufficiently planned and supervised that the individuals are unlikely to suffer any harm. He will ascertain that the previous research and the purpose of the experiment justify this additional method of investigation. Before proceeding he will obtain the consent of those individuals or their agents, and will do so only after explaining the purpose of the clinical research and any possible health hazard which he can foresee.

Similar restrictions are to be found in ethical standards of the various provincial medical associations. In addition, the *International Covenant on Civil and Political Rights*, Article 7, prohibits medical or scientific experimentation on humans without their "free consent". Our recommendation concerning experimentation, at pp. 34-35 below, is consistent with this approach.

It is no surprise to find that the law requires informed consent, i.e. a voluntary consent made with understanding upon a disclosure of risks including the seriousness of the risks such as a reasonable person would want to know about as relevant to his or her decision to go ahead with the treatment. Thus the case law does not leave it to the doctor to disclose such risks as he or she may see fit. Moreover, the patient-client is entitled to know the profession's generally prevailing opinion of a particular treatment, not just the particular doctor's view of the treatment and its risks. In short, the patient-doctor relationship is not to be construed as a paternal relationship, but rather as a democratic relationship wherein due respect is paid to the patient's decision. The law does not require the patient to make a "rational" or even a conventional decision. The sole requirements are that the decision be made voluntarily with an understanding and competent mind upon disclosure of the risks involved.

Exceptions are made for those who are too ill to exercise an informed consent. Under existing provincial mental health legislation persons may be found to be incompetent and committed to a mental health facility involuntarily. The criteria for such committals vary. In some provinces, a distinction is not made between "competency" for committal purposes and the capacity to understand and consent to or refuse treatment. Once committed, the practice seems to be to administer without consent such treatment as the professionals concerned think proper and appropriate. The proposed *Uniform Mental Health Act* distinguishes between competency and consent and provides for the consent even of involuntarily committed patients. Section 26(14) of the proposed *Act* would permit any person who is able "to understand the subject matter in respect of which consent is requested and able to appreciate the consequences of giving or refusing consent" to make an individual choice. The proposed *Act* goes on to provide for substituted consent in terms roughly parallel to some existing provincial legislation. That is, where the patient is not able to give an understanding consent, a decision may be made by next of kin, an appointed guardian or by a Review Board.

Incompetency under most provincial mental health statutes can be found where the person (1) is suffering from a mental disorder and (2) demonstrates a lack of ability to care for himself or herself, (3) is likely to do serious injury to him/herself, or (4) is likely to injure others. Should behaviour constituting a "management problem" (given proof of a mental disorder) justify certification and consequent treatment without consent? The alternative to certification may be a transfer to segregation, or to a provincial health facility on consent.

Provincial criteria for incompetency govern the certification of federal penitentiary inmates whether the certification is done on transfer to a provincial facility or to one of the Regional Psychiatric Centres. Given the variations in certification criteria from province to province there may be some inequality of treatment among federal penitentiary inmates as a whole. The variations, however, may be "demonstrably justified" and therefore meet the section 1 test, given the problems that would attend any attempt by the federal government to achieve uniformity for its inmates by devising its own criteria for certification. If the *Uniform Mental Health Act* is adopted this particular inequality will disappear.

What criteria ought to govern the decision to impose treatment on a person who lacks capacity to make an understanding choice in the matter? The Law Reform Commission of Canada in Working Paper 43, *Behaviour Alteration and Criminal Law*, states that there must be a proportionality between benefits and risks. Such a proportionality could be said to be lacking, for example, in the case of an experimental lobotomy upon a person convicted of an offence of violence, and allegedly suffering from an inability to handle stress without resort to violence. The proportionality principle requires a balancing of the degree of invasion of personal privacy and autonomy against the risks, the chances of success, and the foreseeable side effects of treatment. Related factors include the validity of the proposed treatment and its acceptance by professionally competent people. Other criteria mentioned in the literature would require that the treatment be intended solely for benefit of the inmate-patient; that the treatment decision be generally consistent with the type of treatment decision that would be made in a non-prison setting; and that the treatment be no more than is reasonably required to bring the inmate-patient around to a state of understanding and independent decision-making.

Where there is an understanding mind, the consent must be voluntary and not coerced. This requirement has led the Law Reform Commission of Canada to say in Working Paper 43 that treatment offered to inmates as a condition to their gaining early release runs afoul of the risk of coerced treatment. Indeed, there is some suggestion that any consent obtained in the atmosphere of a penal institution is by its very nature coercive and involuntary. The U.S. case of *Kaimowitz*[30] reached this conclusion, holding that an inmate's signing of a consent form authorizing psychosurgery, intended to reduce aggressive stimuli in the brain, was not a true consent; the contemplated experimental procedure was said to be contrary to the "right to privacy of the mind."

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[30] *Kaimowitz v. Michigan Department of Health*, (1973) 42 U.S.L.W. 2063.

A distinction should perhaps be drawn between coercive conditions which imply an element of unfairness or lack of reasonableness and conditions that only weigh heavily towards a certain conclusion but are no more "coercive" than many other factors affecting daily decision-making. Inmates suffering from illiteracy, lack of social skills or alcoholism, for example, may not wish to take courses or educative counselling programs But is it unfair or coercive to expect them to take approved programs as a precondition to early release? Probation often involves "coerced" attendance at educational or health services. Children are required to attend school until age 15 years, presumably in the public interest in an educated, socially skilled citizenry. Differences in the degree of invasion of bodily integrity distinguish such behavioural programs from the kind of issue in *Kaimowitz*. The United States cases, in general, reflect a concern for informed consent in prison settings, a concern that is based upon a recognition of the inherent dignity of persons with a capacity to choose whether to exercise their right to privacy. *Kaimowitz* represents one application of the principle under circumstances posing a grave risk to the inmate.

CSC policy requires obtaining consent before treatment in programs offered at the Regional Psychiatric Centres is undertaken. Programs at such centres offer treatment to the severely psychiatrically ill (drug therapy) and group counselling for behavioural disorders relating to aggression/violence and sexual dysfunction. A consent form that is cast in general terms is used. Supplemental verbal disclosure of a kind that meets the educational level of the inmate would be required as in the normal doctor-patient relationship. However, it may be useful to supplement the consent forms with additional material that describes the program or treatment involved and includes a statement of the length and duration of anticipated effects or consequences (both positive and negative) of any drug therapy involved. The professional codes of ethics, referred to above, contain useful criteria for such reasonable, informative disclosure.

With respect to voluntary admissions to Regional Psychiatric Centres or other health care units within the prison system, it is not persuasive to argue that an application for admission must be seen, by itself, as a consent to whatever treatment is prescribed upon entry. The argument is a variation of the argument that the patient has given an implied waiver of his right to withdraw consent. Waiver of a right to refuse treatment should be clear and unambiguous, just as waiver of other constitutional rights, such as the right to counsel, must be clear, unambiguous, and made with a knowledge and appreciation of the consequences. The recent Supreme Court of Canada decision in *R. v. Clarkson*,[31] while addressing waiver of the right to counsel, serves as an analogy. The waiver of a constitutional right to refuse or withdraw from treatment should not be assumed by where only of an application for admission to a mental health facility. No doubt there can be valid express waivers of a right to refuse treatment, but a simple signature on a consent form as part of an admissions procedure would riot suffice.

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[31] *R. v. Clarkson*, [1986] 1 S.C.R. 383.

To summarize this part, then, the inmate's voluntary, informed consent must be obtained and respected. Even where the inmate is "committed" under the provincial health legislation on the ground of incompetency, the evolving test appears to be the inmate-patient's informed understanding in regard to particular treatment. Absent such capacity to understand, substituted choice or consent can be made under the relevant provincial statutes. The need for uniformity between the provinces in respect of certification criteria and consent is apparent.

Finally, the decision to provide treatment to those who are certified to be incompetent and who, moreover, lack capacity to understand the consequences of treatment should be governed by criteria of reasonableness and proportionality not only with respect to the degree of invasion of privacy and autonomy but also with respect to the degree of risk involved and the likelihood of success.

4 **Federal correctional statutes should expressly recognize the principle of voluntary, informed consent to treatment made by a person with a capacity to understand the subject matter in issue and an appreciation of the consequences of his or her decision.**

5 **Federal correctional legislation should expressly recognize the right of every such person within the custody of CSC to refuse treatment.**

6 **Federal correctional legislation should provide that**

a) **experimentation should be conducted only within strict criteria for professionally approved programs, and with the offender's consent.**

b) **offenders may participate in therapeutic experimental research programs, provided that (1) the program has been approved as medically sound and in conformance with medically accepted standards; (2) the offender has given full voluntary and informed written consent; (3) in the case of psychosurgery, electrical stimulation of the brain, and aversive conditioning, approval has been given by an appropriate court after a hearing to determine that the program is sound and that the offender has given informed consent.**

c) **a program should be considered medically sound and in compliance with medically accepted standards only after it has been reviewed by a committee established by law to evaluate its medical validity.**

d) an offender should be considered to have given informed consent only after that consent has been reviewed by an independent committee, consisting of lay persons, including offenders or ex-offenders.

e) for the purposes of correctional legislation, "informed consent" means that the offender is informed of (1) the likely effects, including possible side effects, of the procedure; (2) the likelihood and degree of improvement, remission, control or cure resulting from the procedure; (3) the uncertainty of the benefits and hazards of the procedure; (4) the reasonable alternatives to the procedures; and (5) the ability to withdraw at any time.

Treatment Without Consent

7 Federal correctional legislation should provide the following:

a) Where an offender has lost the capacity to give an informed consent, upon an application under the mental health act of a province, the offender may be found to be mentally incompetent, and in such event, the offender's next of kin, or guardian, or the director of mental health services for the mental health facility may authorize appropriate treatment.

b) Where treatment is given without the offender's personal consent, only that treatment shall be administered as is the least intrusive means available and feasible to restoring the patient to a state of competency.

c) In an emergency, an offender who is suffering from a severe mental disorder and who refuses consent to treatment may be transferred to a provincial mental health facility without prior judicial authorization providing

(i) the offender poses a substantial risk of harm to others or to himself or herself; and
(ii) the Director of the mental health facility consents to the transfer and directs such reasonable treatment as may be necessary.

PART IV: FORCE FEEDING

At first glance, force-feeding may be thought to be unrelated to mental health services for prisoners, but it raises many of the same questions that underlie the right to refuse treatment.

Canadian case law gives no clear answer to the question of whether the state is obliged to force feed prisoners or others who deliberately and in full understanding refuse treatment or the necessaries of life. In a life-threatening situation, a Quebec court granted an order authorizing forced treatment for surgery for the removal of a wire from the throat of a disappointed immigrant who had been refused entry into Canada.[32] Mr. Niemiec, the immigrant, had refused to consent to allow removal of the wire, saying it was better to die than go back to Poland. It is important to note the implicit manipulation of governmental officials as a factor in the case, as the same may be the case in many hunger strikes in the corrections context. Whether this factor was present in the mind of the court we do not know, because the decision to authorize treatment was expressly based on the state duty to preserve life, a duty which the judge found to override individual autonomy. As already indicated, the *Quebec Civil Code* imposes an obligation to give treatment in emergencies; this may also have coloured the court's approach to the case. Moreover, collective notions of the common good have issued from Quebec's courts.

In British Columbia, the Court of Appeal refused to order correctional officials to provide medical treatment in order to save the life of a fasting Doukhobor inmate, Mary Astaforoff, who had made a deliberate and conscious decision to starve herself to death.[33] The Court was not convinced that there was a duty requiring correctional officials to force-feed an inmate in such circumstances. Neither did the court specify that there was no such duty.

According to American case law, where the inmate's refusal of treatment appears to be aimed at manipulation of the system to his or her immediate gain, the court may override the inmate's refusal of necessaries.

In one American case involving an application for permission to force-feed an inmate, the dissenting judge was not persuaded that the state interest in preserving the life of the inmate in order to obtain his conviction on outstanding charges overrode the right to privacy and to self-determination. The judge did not accept that allowing the inmate to refrain from eating amounted to assisting in a suicide. Rather, he saw it simply as a case of respecting the inmate's right to be left alone and to make personal decisions affecting his own well being. The inmate's decision to starve himself did not trespass on the rights of others, said the judge, and a decision not to force-feed was not aiding a suicide but merely leaving it to the inmate to speed the natural processes of death. In his dissent Douglas, J., set out useful criteria for consideration in developing law in this area.

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[32] *Auditor General of Canada v. Notre Dame Hospital et al.*, (1984), 8 C.R.R. 382 Que. S.C.).

[33] *A.G.B.C. v. Astaforoff*, (1984) 4 W.W.R. 385 (B.C.C.A.)

> I would, therefore, require that any prisoner seeking to avoid force-feeding must petition the institution for a hearing before a neutral official to determine (1) that the prisoner has no condition or demand he is seeking to extract or manipulate from corrections personnel in return for his not fasting; (2) that he is competent and is voluntarily and knowingly entering into his fast with an understanding of the consequences; (3) that he has been examined by a physician who has explained to him the physical phases and reactions his body will endure (informed consent); (4) that he executes a voluntary release of all civil or criminal liability (including any claim under 42 U.S.C. 1983) to the employees and government confining him; (5) that he waive appointment of any guardian seeking to exercise "substituted judgment" for him when he deteriorates to the point of mental incompetency; and (6) that he agree that the authorities will neither aid nor assist him in any way by medical attention; in other words, he must die truly unassisted by the government.[34]

CSC policy allows forced feeding in limited cases. CD 825, entitled *Hunger Strikes*, states:

> 4 Involuntary feeding procedures shall only be used when it has been determined by psychiatric advice that the inmate's capacity for rational judgement is impaired and that according to medical advice it is the only reasonable solution left to preserve life.

In summary, although Canadian case law does not explicitly recognize a "right to die" neither does it set out an express duty to preserve the lives of inmates in federal prisons who intelligently and with full understanding refuse treatment and necessaries even to the point of death. The ambiguity which faces both correctional administrators and inmates in force-feeding situations must be resolved.

It is proposed for purposes of consultation that correctional legislation should clearly state the general rule that a competent person's decision to refuse all necessaries shall be respected, for example:

> **8 Federal correctional legislation should provide that the Commissioner of Corrections shall not authorize force feeding of inmates, and that no person shall force feed an inmate.**

This raises for discussion whether this should be the case regardless of the grounds for the decision; whether for religious conviction, or for personal or political reasons, and whether there should be any exceptions to the general rule.

Where an inmate's physical condition deteriorates to the point where hospitalization is necessary, transfer to an outside hospital would and should be authorized on medical grounds. Medical care, including the possibility of force feeding, is then the responsibility of that provincial facility, and federal correctional legislation would no longer apply.

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[34] *Re Caulk*, (1984) 480 A. 2d93 (N.H. Sup. Ct.). at p. 100.

Where the inmate is judged by a psychiatrist to be incompetent to make rational decisions with respect to eating, the inmate may be transferred to a psychiatric facility and, pursuant to the relevant provincial legislation governing the treatment of persons found incompetent to give or withhold consent, may be treated. This facility could be a provincial mental health facility or a CSC treatment or psychiatric facility. An exception to the general rule might be framed:

> 7 force feeding may only be authorized in CSC facilities in accordance with the appropriate provincial legislation governing involuntary treatment.

Is this an appropriate exception?

In addition, we wish to raise for consultation the question of whether there are situations where an inmate's decision to starve to death can be said to "trespass on the rights of others" or actually place the lives of others in danger, and whether situations of this type could ever justify force feeding.

PART V: IMPLICATIONS OF RIGHT TO TREATMENT FOR INSTITUTIONAL DECISION-MAKING

Given a duty to provide treatment (or alternatively a right to treatment) and a right to refuse treatment, what implications flow for institutional decision-making at such critical points as placement, classification, transfers, disciplinary proceedings and parole release or mandatory supervision decisions? What changes if any would be required in terms of existing law or regulation? To begin with, what legal rules or policy directives now in place at the above stages of the process direct officials to take mental health needs into account?

INTAKE/PLACEMENT

At the intake or placement stage, the *Penitentiary Service Regulations* require " ... an investigation into the medical, psychological and social ... condition and history of the inmate...", and placing inmates in an " ... institution that seems most appropriate having regard to protection of society and ... the program of correctional training considered most appropriate for the inmate." Commissioner's Directive 500 entitled *Reception and Orientation of Offenders* calls for a reception process that will ensure that all new inmates undergo a full assessment of their program and security needs which may include medical, psychological, psychiatric, vocational and educational assessments (s.2).

CLASSIFICATION

Apart from the general statements in the *Regulations* referred to above, there are no specific references to mental health needs in the classification process, although the above Commissioner's Directive directs officials at this stage to take into account "program needs of the offender", as well as other factors such as security needs, in making placement decisions (s.9).

TRANSFERS

On transfer, again there is no specific direction in the *Regulations* respecting mental health needs. The Commissioner's Directive on *Transfer of Inmates* (CD 540) provides that one of the reasons for the transfer may be to provide adequate medical and psychological treatment (s.11). In practice, security needs far outweigh other considerations in the transfer process. This is especially so where an emergency transfer is undertaken.

"Crisis transfers" to regional psychiatric centres in B.C. and Saskatchewan do occur, as for example on a suicide attempt, without the inmate's consent, only pursuant to the involuntary committal procedures of the relevant provincial mental health legislation, as they are accredited hospitals. Kingston will, however, take other involuntary patients transferred by CSC into its programs. These transfers in B.C. and Saskatchewan are of varying duration under provincial law, ranging from one to 30 days. After the relevant time period, the transfer must be reviewed and the inmate committed for a longer period or returned to the penitentiary. In the meantime, as indicated in the analysis of treatment without consent, mental health needs are attended to.

In general the RPC staff resist requests by management for the transfer of prisoners who are not treatable or for whom the centre has no appropriate program. A less stringent standard would reduce the centres to an incapacitative role from their present therapeutic role.

Crisis transfers out to provincial mental health facilities, as with the case of RPC transfers, must meet legislative criteria in the applicable mental health act and the professional standards of the staff in question. Thus, a failure by CSC to specifically address mental health issues means that provincial and professional criteria apply. Most provincial mental health legislation does not recognize behavioural disorders as a mental illness qualifying for a transfer; the proposed *Uniform Mental Health Act* does.

DISCIPLINARY PROCEEDINGS

Regulations and Directives do not address health care needs in the disciplinary process. An exception is made at the Regional Psychiatric Centres, where the *Case Management Policy and Procedures Manual* states that " ... no inmate shall fail to earn remission ..." because of mental or physical disability while he or she is under treatment. In practice, a mentally disordered inmate may receive special consideration either in the guilt-finding process or in the form of disciplinary action taken. This, however, is within the discretion of the particular person in charge.

If dissociation or solitary confinement is awarded as a punishment in disciplinary proceedings, Divisional Instructions require a psychological or psychiatric assessment of inmates, and state that treatment needs are to be taken into account during dissociation. Should the required report show some special mental health need, the practice is to remove the inmate for treatment.

PAROLE

In the parole process, neither the *Parole Act* nor the *Regulations* specifically address mental health needs, although one of the statutory criteria for parole release is the rehabilitative needs of the offender; indeed, the concern for mental health needs arises largely in the context of offenders thought to pose a "risk to society", i.e., the dangerous offender. With regard to this category of offender, the *Parole Policy Manual* requires that psychiatric or psychological reports be obtained prior to a parole release decision. The orientation of policy in this respect is not treatment, but delay in release in order to "protect" the public. On the other hand, treatment is taken into account prior to release as a means of reducing risk, and treatment following release may also be required for the same reasons.

While parole board members may believe an inmate to be in need of mental health services or programs prior to release, the inmate may nonetheless be refused entry into those programs at the Regional Psychiatric Centres for lack of readiness for or amenability to treatment. As a result, the inmate may feel caught in a cleft between the Parole Board telling him to show initiative and get treatment and the RPC not admitting him.

An inmate who is not released on parole by the time he or she has served two-thirds of the sentence, will be released on mandatory supervision subject to the 1986 amendments to the *Parole Act* that permit the National Parole Board to refuse release of persons otherwise eligible for mandatory supervision on the ground that the person is a danger to society. Like parolees, offenders on mandatory supervision are under the supervision of parole officers and are subject to various general or special conditions which may include a requirement to attend for treatment at a community based facility. However, in certain areas there are limited facilities and some inmates on release are generally unwilling participants in such services. Some community programs, it is said, do not like having them as clients. Given the uncertain effect of such programs, especially under the above conditions, parole officials often feel there is little they can do for the mental health needs of the person on mandatory supervision.

The public has an expectation that protection through supervision or treatment can be delivered; it is commonplace to observe that very little can be done "to protect" for the simple reason that very little has been shown to work. Forcing people to take treatment, moreover, is no answer to a call for protection if treatment cannot offer protection. It is apparent that parole/prison officials could attempt to avoid public criticism by transferring responsibility for difficult prisoners, prior to release, to provincial mental health facilities in certain cases. The risk here is that therapists are called upon to make such therapeutic transfers when the therapist is not able, professionally, to say that the prisoner is mentally ill or can be treated. It is not clear from reading the various reports to what extent frustration over such transfers arises from failure to deal with (1) established medical illness as opposed to (2) cases posing difficult behavioural problems and a risk of harm to others upon release, but not recognized by psychiatrists as suffering from an "illness".

Transfers to provincial health facilities are examined in greater detail in a later section. Suffice it to say here that, setting aside for the moment problems arising out of fear of public criticism and an evident desire to avoid paying for services, the problem of mental health needs at parole and mandatory supervision should be governed by the same principle as that applying within the institution; namely, an obligation to provide needed services subject to the principle of informed consent.

As to specific regulations and policies, then, at the critical decision making stages of placement, classification, transfers, disciplinary hearings and parole, there is little express direction with respect to relevance of mental health. Given their importance, it is proposed that legislation direct officials to take mental health care needs, and programs and services, into account at each of these stages.

9 **Federal correctional legislation should state that in all significant institutional decision-making processes including placement, classification, transfers, disciplinary proceedings and release decisions the mental health needs of the inmate shall be given reasonable consideration along with the security needs of the institution and the protection of society.**

PART VI: TRANSFERS TO PROVINCIAL MENTAL HEALTH FACILITIES: *PENITENTIARY ACT*, SECTIONS 19 AND 20

SECTION 19

It has long been thought desirable to transfer the severely mentally ill from penitentiaries to mental hospitals. Even if the federal government expands its facilities, there will no doubt remain cases where transfer to a provincial mental hospital is the most appropriate measure. The *Penitentiary Act* provides in s.19 for federal and provincial governments to enter into agreements in order to facilitate the transfer of "mentally ill" or "mentally defective" inmates to a provincial health facility. Such transfers, however, are not common. This part of the working paper reviews this transfer issue and the options that can be pursued in dealing with the problem.

Hospitals, by virtue of the constitution, fall within provincial jurisdiction; federal officials have no power to compel a provincial hospital to admit penitentiary inmates suffering from mental disorders. Indeed, hospitals are governed by provincial health legislation which, as a general rule, leaves admissions to the discretion of the hospital. Generally, the legislation does not create a duty to admit to care and treatment, although, as already noted, the British Columbia *Mental Health Act* grants to residents of that province an "entitlement" to mental health services offered under the *Act*. In general, however, the common law and statutory approach is not to grant a right to treatment nor even a duty to offer treatment, but to reserve to the government a discretion to confer certain social services as it sees fit. Since the *Charter* came into force, it may be argued that the extent of governmental discretion in health care matters has been reduced. The same can be said of the discretion of health care officials. Arguably, the refusal to admit a person into hospital care would now be unconstitutional if it were based on discriminatory grounds, for example. But lack of expertise or of programs suited to the patients' needs may not be an improper reason for refusing admission. In any event, even where there is a federal-provincial agreement for the transfer of penitentiary inmates under section 19 of the *Penitentiary Act*, the particular hospital may still have discretion not to accept a particular patient.

Apart from problems of whether the inmate meets the *Act*'s definition of mental illness as a pre-condition to admission, or whether he is a danger to himself or others, other reasons have been advanced for the general failure of section 19 to accomplish its purposes. Sharpe summarized the factors in 1983 as follows:

> (i) The provinces have inadequate forensic psychiatric facilities, in terms of both treatment and security.
>
> (ii) The provinces are overburdened with their traditional civil mental health responsibilities.

(iii) There is a perceived danger to civil programmes and patients.

(iv) There is an inability to reach agreement on mutually acceptable *per diem* rates and other cost-related factors.

(v) There is confusion as to whether certifiability should be the standard for provincial acceptance during the term of imprisonment and, if not, as to whether and when civil commitment should be sought prior to scheduled release.[35]

Except for the last mentioned factor, all of the above obstacles to action represent different views that are unlikely to be resolved by new legislation. However, as noted earlier, a narrow provincial definition of "mental illness" may preclude a transfer, but presumably a wider more agreeable definition could be provided in the transfer agreement or in section 19 itself. While the criteria for involuntary admission to mental health facilities differ from province to province in detail, in general all require a finding that the person suffers from a mental illness or mental disorder and is a threat to himself or to others.

Certification under provincial health legislation may also be used in the Prairie and Pacific Regions in order to remove mentally ill persons from the general prison population to the Regional Psychiatric Centres which, in those regions, are accredited hospitals. Such a transfer bypasses the section 19 procedure.

The problem of any transfer, whether out to a provincial facility or over to a RPC, being subject to the vagaries of provincial definition of mental disorder or other criteria may become a thing of the past. The provinces are currently considering adoption of the proposed *Uniform Mental Health Act* under which "mental disorder" is broadly defined to include behavioural disorders. It is not known how many mentally disordered offenders within the penitentiaries could benefit from an improved section 19 transfer process. Apparently, section 19 has been restricted to date to cases of severe psychiatric disorders of a treatable nature. Given the trend towards closing down long term psychiatric hospital beds in the provinces, chronic cases are not likely to be transferred from the penitentiaries. The *Needs Study* identified a total of 805 chronic psychiatric cases in all regions across Canada. Four regions offer specific programs for chronic cases and the Atlantic offers programs for acute and sub-acute cases. Admittedly, the danger of setting up "chronic care wards" in the penitentiaries is that they may deteriorate into the hopeless "back wards" of the old insane asylums. It is not known what percentage of the 694 acute and sub-acute cases were adequately dealt with by resources within the penitentiary health service; only the Atlantic region is identified in the *Needs Study* as having expressly requested additional "basic" resources.

Assuming that there are a small number of acute and sub-acute cases and a large number of chronic cases whose needs are not reasonably well provided for under the present level of CSC mental health services raises a critical question for discussion that cannot, at this stage, be answered by legislation:

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[35] Sharpe, Gilbert, Project Chief, *Mental Disorder Project: Discussion Paper*, Department of Justice, 1983, at p. 296.

does the solution to these unmet needs lie with transfer to provincial facilities or does it lie in expanding federal services within the penitentiary system?

One advantage to a federal expansion of health care services over reliance on transfer to provincial mental health facilities would be the maintenance of federal control over admissions, as well as standards and quality of care. Provincial variation in available services is noted as a serious concern in the various reports dealing with mental health services.

Several disadvantages of a federal expansion of health care services have been argued. Providing health care has been said to be beyond the "secure custody" mission of the penitentiaries; yet necessary health care may be no more of an exception to the "secure custody" mission than provision of proper diet and decent living conditions. Moreover, the first Working Paper of the Correctional Law Review recommends a correctional philosophy that recognizes a place for offering remedial or therapeutic programs for offenders. This is reflected in CSC's own mission statement.

Duplication of services and the resulting inefficient use of resources has also been identified as a potential disadvantage of expanding federal health services for inmates, but this must be assessed against the federal responsibility or duty to provide treatment to inmates. Nor is it to be assumed that simply because two different levels of government provide health services within their own constitutional jurisdiction that inefficiencies result. Before coming to a final conclusion on the efficiency argument one would want to obtain data relating to overlapping clientele, the underutilization of services, and the costs of shifting to a unitary approach.

It would be useful to know the cost of providing health care through section 19 transfers as opposed to the cost of expanding federal services. Given the fact that substantially increased use of section 19 transfers would probably require an expansion of secure facilities at provincial expense, it may well be cheaper to expand existing RPC facilities.

Assuming, however, that federal services are expanded, it is still necessary to provide for an effective transfer mechanism for cases where transfer to provincial mental health facilities may be called for. As noted earlier, problems with the section 19 transfer mechanism stem from problems with scarce resources, and regardless of whatever improvements or innovations can be made in transfer mechanisms, the resource question will continue to underlie this whole issue. Therefore the present section 19 mechanism in combination with exchange of Service Agreements between the federal government and individual provinces may have the most effective option in the circumstances. Other possible options have been suggested and are discussed here.

One such option is the creation of a federal provincial tribunal with authority to consider such transfers. Such a body could operate through a legislated framework, with authority to order transfers, or it could run in an administrative advisory capacity. Since a province cannot delegate its powers to a federal board, the first approach would require enabling legislation by both the federal government and the province; unilateral legislation by the federal government would, of course, be insufficient. Any number of federal-provincial boards could be created by such joint legislation, but, the likelihood of such legislation coming about in the near future must surely be slim.

The second approach would see the establishment of a federal-provincial Advisory Board that has no actual decision-making powers. The Advisory Board could be comprised of federal representatives and representatives from each province (most likely psychiatrists and psychologists). Where a case of possible transfer to a mental health facility of a particular province arises, the provincial representatives of the concerned province would be consulted about treatment options, and the Advisory Board could make a recommendation as to treatment, and as to whether or not to recommend admission to provincial facilities. Even though the provincial facility would still retain discretion as to whether or not to accept the transfer, the Board's recommendation would supply a certain degree of political pressure.

In short, because penitentiary inmates are a federal responsibility there is an overwhelming case to be made that federal responsibility for medical care includes their mental health needs as well. The outstanding questions relate to costs and means. Given the reluctance of the provinces to accept federal inmates under transfer agreements the most feasible way for the federal government to fulfill its constitutional obligation is to expand health care services within the penitentiaries and to also provide community-based services for offenders on mandatory supervision and parole through purchase from community-based organizations.

SECTION 20

It should also be noted that section 20 of the *Penitentiary Act* provides an avenue to facilitate the transfer of mentally disordered offenders to provincial health facilities at the time of their discharge:

Discharge of Diseased Inmates

> 20 Where, on the day appointed for the lawful discharge of an inmate from a penitentiary, he is found to be suffering from a disease that is dangerous, contagious or infectious, he shall be detained in the penitentiary until such time as the officer in charge has made appropriate arrangements for the treatment of the inmate in an appropriate provincial institution or until the inmate is cured, whichever is the earlier.

This section does not create a power to transfer. Rather, it only permits penitentiary authorities to detain an inmate pending a transfer arrangement under section 19 as discussed above.

Section 20 clearly contemplates the transfer of mentally ill or mentally disordered offenders who would otherwise have to be released on the expiration of sentence. For our purposes, the section is specifically limited to persons considered to be "dangerous", as no additional criteria such as "mentally disordered" are set out. This poses a problem for, as already outlined, provincial mental health legislation requires as a precondition to admission to a mental facility that the person be suffering from a mental illness as defined in the *Act*. Danger to self or to others alone is not a sufficient criterion for admission; consequently, attempted transfers based on section 20 concerns are bound to face problems if the prisoner is not "mentally ill" according to the definition found in the relevant provincial legislation.

The proposed *Uniform Mental Health Act*, as indicated, has a broad definition of "mental disorder" that may include the behavioural disorders of persons thought to be "dangerous" and, to this extent, would make it easier to accommodate a transfer based on section 20 conditions.

While the social interest underlying section 20 is understandable, namely protection of the public, the legislation itself is arguably unconstitutional in its attempt to detain prisoners after sentence has expired. It offends the notion of fundamental fairness for the government to decide that a person is "dangerous" and on that word alone authorize the detention of such a person. Given the unreliability of predictions of dangerousness, this is especially the case. Further, where the prediction is made within a prison environment, which itself may be productive of behavioural disorders, caution is even more appropriate. There is no reason why an inmate who has reached the date of lawful discharge should not be treated like anyone else; that is, by way of applicable provincial mental health or quarantine legislation. Section 20 is clearly out-dated, rarely used, and should be repealed. This is not meant to overlook the fact that availability of public mental health services for inmates upon release varies among the provinces. There is a pressing need to ensure that feasible alternatives for managing dangerous, mentally ill inmates at the end of their sentence are available at the provincial level. It would be untenable if such individuals were released directly into the community because of a lack of appropriate security provisions at provincial mental health facilities.

10 Section 20 of the *Penitentiary Act* should be repealed.

PART VII: CONFIDENTIALITY AND RIGHT TO KNOW

Further issues that arise in relation to treatment of mentally disordered inmates concern confidentiality and the inmate-patient's right to know what's on his or her own file.

CONFIDENTIALITY

Confidentiality of medical records generally has been a social concern for some years, both outside and within the penitentiary context. The concern arises when the doctor's ethical responsibility to keep the patient's disclosures confidential and the patient's interest in keeping such matters private conflicts with professional need to share such information with other health professionals working on the case, or conflicts with an institutional or public interest in being forewarned about risks of patient "dangerousness".

At present, Canadian law does little to help resolve these conflicting interests. The discussion in this part will set out the doctor's ethical obligation not to disclose and the exceptions to this general ethical rule. In addition, the discussion will show how legislation relating to hospital medical records now recognizes claims of privacy and tends to limit disclosure of medical records to third parties and how the lack of a comprehensive set of rules impedes the development and carrying out of therapeutic and treatment programs in the prison/parole process. The final section deals with the inmate's right to know what is in his or her own medical file.

The Canadian Medical Association Code of Ethics places a high ethical obligation on the physician not to disclose:

> 6 (The physician) will keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except when the law requires him to do so.

The law, however, recognizes no privilege attaching to the doctor-patient relationship. Hence, what a patient tells a doctor may be required by law to be repeated in court. The courts in general, however, are slow to force doctors to give such evidence, recognizing the social value of respecting the privacy of doctor-patient communications. Confidentiality, it is said, encourages trust and a full and frank disclosure by the patient; this in turn maximizes the likelihood of correct diagnosis and successful recovery.

Clearly, disclosure must be made to third parties when it is in the interest of developing and carrying out a treatment plan dependent upon those very individuals. Thus, disclosure to other health professionals for the purpose of facilitating a patient's treatment is seen as a necessary exception to the ethical obligation not to disclose. In the prison setting, particularly in relation to behaviour rather than medical disorders *per se*, does the right to disclose extend to members of the Case Management team, or to the Chaplain, for example? In some instances, disclosure to non-medical staff has been justified under circumstances where security staff are asked to watch the patient for signs of a recurring illness or disorder. These and other practical realities of the closed prison community exert strong pressures on the doctor to disclose, and raise for him or her a conflict of loyalties.

This conflict is theoretically increased where the doctor is an employee of CSC (although this is rarely the case, since most doctors provide health care services to inmates on a contract basis), and thus has an obligation to share relevant information with his or her employer. Yet as a health-care professional he or she also has an obligation to protect the confidentiality of the patient's communications. Moreover, parole officials, security staff or management may, for good institutional reasons, want to know about the inmate-patient's mental or behavioural diagnosis or treatment program. Should health care professionals be obliged to make such disclosures?

The answer may well be "it depends". For one thing, the prison therapist's duty of obedience to the employer does not compel breach of confidentiality. If there is a duty to disclose it must be based on other values. The Supreme Court of Canada addressed the employment conflict in these terms:

> ... an employee's duty of obedience towards his employer does not mean that the latter has any power to compel his employee to act in breach of a duty of confidentiality. The medical director of a hospital cannot release a doctor from his obligation of confidentiality towards his patient, only the latter may release him from his duty.[36]

In support of the therapist's reluctance to disclose information to parole and prison officials is the fear that under such circumstances inmates will not "open up" and treatment will be impossible, or possibly that disclosure will result in the improper use of medical information by untrained persons. The discussion of the *Tarasoff* case below suggests that the first fear may be exaggerated and, further, that where disclosure has been made, the practice to date does not appear to support the fear of misuse of information.

Indeed, in general practice the traditional view is that medical files are the property of the doctor or the hospital. This "ownership" of the files feeds the reluctance to disclose to third parties, and has sometimes led to a reluctance even to transfer a medical file from one institution to another. However, the public interest in conserving resources and in facilitating a treatment program argues that the file be forwarded. In resolving this conflict of values, health care professionals should not have their professional integrity undermined by a rule that requires disclosure of confidential information at the total discretion of institutional authorities.

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[36] *Attorney General of Quebec and Keable v. Attorney General of Canada*, (1979) 1 S.C.R. 218 at p. 250.

Current provincial and federal legislation does not resolve the conflict facing the prison therapist. For example, provincial legislation requires the doctor to disregard confidentiality in certain instances by requiring him or her to report patients suffering from venereal disease and persons suspected of child abuse. Other provincial legislation aimed at hospitals requires disclosure of information on the medical record, under certain circumstances, to coroners, medical practitioners or to a person armed with a court order. The latter type of provincial legislation does appear to recognize a right of privacy to hospital records in that it requires disclosure only in certain cases. A similar pattern of restricted disclosure requirements can be found in provincial legislation governing mental hospitals.

This general respect for the private nature of hospital records is also reflected at the federal level through provisions of the *Privacy Act*. The *Act* prohibits disclosure in general, but permits certain exceptions, namely disclosure of medical information for a medical purpose (as in the course of disclosure to a medical or health-care team).

Where the patient consents to the disclosure of the medical record for certain purposes there is no conflict; such conflict, as with consent to treatment, however, should be expressed in writing and made upon a full disclosure of the nature of the information and the purposes to which it will be put. That is to say, outside the prison setting the patient has a claim to privacy which must be balanced against the professional's interest in sharing the information with other professionals in order to maximize the patient's health benefits. Since law and morality place a high value on autonomy of persons and their capacity to make responsible decisions, the patient's interest, including the inmate-patient interest, in privacy should be respected. Before information is transmitted from one health care official to another or from one institution to another, the patient should be fully advised.

In an important study on confidentiality of medical records Mr. Justice Krever stated that in the ordinary case the patient's interest in privacy of medical records requires consent prior to disclosure, the exception being when an emergency or crisis makes it impracticable to get such consent.

The Krever report takes the view that the inmate-patient is not entitled to the same level of respect for confidentiality of medical records as the person on the street. The report recommends:

> ... that legislation governing confidential information maintained by hospitals and health-care facilities permit the disclosure of information, concerning a patient who is confined in a correctional institution and who has been hospitalized, to the superintendent, director or medical officer of the patient's institution, for the purpose of maintaining the health of the patient, provided that the patient is notified of the disclosure.[37]

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[37] *Report of the Royal Commission of Inquiry Into the Confidentiality of Health Information* Vol. II, (Toronto: Queen's Printer, 1980) p. 343. (Krever Report).

Is this recommendation too wide? Disclosure to third parties, without consent, could only be "for the purpose of maintaining the health of the patient", but is that the best position to take? Presumably, the patients judgements about what treatment he or she will or will not seek falls within the consent principle. If an exception to the general rule of non-disclosure is to be made could it more plausibly be supported not on paternalistic grounds of what is best for the inmate, but on a theory of countervailing rights compelling disclosure in instances of real and substantial threat to the security of other persons or the institution itself? On this basis confidential medical information may on occasion be relevant to classification, transfer or paroling authorities. Absent some clear evidence of substantial risk, however, the health care professional should not be obliged to breach confidentiality.

Canadians have viewed relevant American law on this point with considerable interest. Imagine the situation where the institutionalized patient told the therapist in confidence that upon release he intended to kill X. Suppose the therapist fails to warn X; the patient is released in due course and promptly kills X. Is the therapist liable in damages in a suit brought by X's estate for having breached a duty to warn? On these facts the California Supreme Court imposed liability in the *Tarasoff* case, holding that there was a duty to warn where the risk was directed at a specific perrson.[38] The Canadian courts are also likely to hold that a duty to warn arises under circumstances of foreseeable harm to a particular person, or to a particular class of persons.

Mr. Justice Krever recognized this, recommending that the law should recognize an exception to the confidentiality rule where the health-care worker has reasonable cause to believe that a patient is in such a mental condition as to be dangerous to himself or others. In such cases, the Krever Report states reporting or warning should not be considered professional misconduct. Exemption from professional misconduct, however, does not protect the prison health care professional from potential lawsuits. It would be preferable if legislation created an exception to the confidentiality rule to take care of the *Tarasoff* type of situation.

The competing interests in these cases include the patient's claim to privacy, the doctor's desire for an atmosphere of confidentiality in order to enhance the effectiveness of health care and treatment, the security interests of management and staff and the rights of potential victims to security of life and person. As between these competing rights, our society places a higher value on life than it does on privacy or the maximization of health care. It should be noted that studies done on the effects of the *Tarasoff* duty to disclose do not show that it has seriously interfered with the physician-patient relationship.

In arriving at a balancing of interests it should be remembered that the security and safety of other inmates and staff are an ever present concern in closed communities such as prisons. In such conditions the duty to disclose in the absence of consent may be higher than it would be in situations arising in the general community where the risks to other persons may be more remote or diffused and where those other persons have greater means of seeking protection than is the case in prisons. Presumably, even in respect to situations arising in the community, there ought to be a duty to warn in certain circumstances. For example, if a patient subject to sudden cardiac arrest insists on continuing to drive an automobile or a psychiatrist knows of a serious risk of suicide or other serious harm, the right to confidentiality should not be absolute.

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[38] *Tarasoff v. Regents of the University of California*, (1976) 551 P.2d 334 (Cal. S.C.).

A serious weakness in the argument favouring compulsory reporting or disclosure in cases of anticipated risk or danger is the unreliability of predictions of dangerousness. In medical matters relating to physical disabilities there may well be a high degree of accuracy, but in relation to psychiatric or behavioural disorders predictions are still off limited reliability. In determining whether the risk is a serious one, therefore, the therapist should pay particular attention to criteria such as those recommended by Monahan[39] in an effort to reduce the unreliability gap.

Right to Know

Related to the issue of confidentiality is the inmate-patient's right to know what is in his file. Historically, physicians and hospitals have viewed medical files as their property, not the patient's. Various reasons are given for this somewhat paternalistic approach to patients, including an argument that disclosure would be injurious to the patient. The requirement that the law treat persons as autonomous beings capable of choice, however, would lead to just the opposite conclusion: namely, that the record should he disclosed to patients. It can also be argued that hiding the record breeds suspicion and distrust.

Mr. Justice Krever addresses this issue and gives five reasons why there should be disclosure:

> First, as an incident of human dignity, a patient ought to have the right of access to the most personal information about himself or herself. No person, even though he or she may be a professional with much knowledge and experience, should be entitled to withhold that information. Second, the patient, in his or her own interest, should be able to correct any misinformation which may appear on his record.

Third, the patient will have a better understanding of his or her treatment and be in a better position to assist in future care. Fourth, access to the file will allow a patient to make an informed consent to the release of information from the file to a third party when necessary. Fifth, access creates a feeling of trust and openness between patient and health-care providers, and the quality of health care will thereby be enhanced.[40]

The federal *Privacy Act*, while promoting a general rule of disclosure of personal information to the person concerned, draws an exception for penal institutions:

Section 24:

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[39] Monahan, J. *Predicting Violent Behavior*, (Sage Publications, Inc., Beverly Hills) 1981.

[40] Krever Report, *supra*, note 37, p. 468.

> The head of a government institution may refuse to disclose any personal information requested under subsection 12(l) that was collected or obtained by the Canadian Penitentiary Service, the National Parole Service of the National Parole Board while the individual who made the request was under sentence for an offence against any Act of Parliament, if the disclosure could reasonably be expected to (a) lead to a serious disruption of the individual's institutional, parole or mandatory supervision program; or (b) reveal information about the individual originally obtained on a promise of confidentiality, express or implied.
>
> Section 28:
>
> The head of a government institution may refuse to disclose any personal information requested under subsection 12(l) that relates to the physical or mental health of the individual who requested it where the examination of the information by the individual would be contrary to the best interests of the individual.

Issues of fundamental fairness and rationality both under the common law and the *Charter* must be balanced against the therapist's judgement as to the effect of disclosure on the therapist-client relationship and the institutional interest in the effect of such disclosure on prison security or the security of specific individuals. The matter should be addressed in federal correctional legislation.

11 Federal correctional law should recognize:

- **a) a principle of confidentiality and impose a duty on penitentiary health care officials or other persons dealing with penitentiary health care information not to disclose it;**
- **b) exceptions to the non-disclosure duty so as to**
  - (i) require a sharing of health care information among health care officials, other institutional or community staff, or staff of private agencies under contract with the agencies, for treatment purposes; and
  - (ii) impose a duty to warn institutional or parole staff or other relevant individuals where a health care official has reason to believe that an inmate in an institution or on supervised release poses a risk to the security and safety of other persons; and
- **c) an obligation by health-care officials to disclose to an inmate, on request, personal health information in the**

inmate's institutional files, subject to an exception in cases where risk to the security and safety of other persons is likely to result from such disclosure.

CONCLUSION

The discussion throughout this paper has focused on the need for mental health services for penitentiary inmates, and the type of legislative provisions which would protect inmates' right to treatment and facilitate delivery of needed mental health services.

The importance of addressing the mental health needs of offenders is underscored by the *Charter of Rights and Freedoms*, in particular the section 7 affirmation of the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This right includes an undefined right to health services that imposes a duty on the state to provide certain levels of health care. Considering the heavy concentration of individuals with severe psychiatric and behavioural disorders within the corrections system, it is important that needed mental health services be provided.

While it is believed that access to such services would reduce management problems, would assist inmates in their eventual re-integration into the community, and would result in a more peaceful and safe society, it is at the same time recognized that provision of such services raises serious questions concerning resources. It is in the area of mental health services, more than any other, that it is clear that the demonstrated need for increased services can be met only through an increased commitment of resources.

The importance of providing such services relates directly to the statement of purpose of corrections developed in the *Correctional Philosophy* Working Paper, which places a high priority on encouraging offenders to prepare for eventual release and successful re-integration into the community through the provision of a wide range of program opportunities responsive to their individual needs. The public, including victims groups, are convinced that "something should be done" to enable inmates such as sex offenders to deal with any mental health problems they may have. The recommendations in this paper are aimed at facilitating delivery of needed mental health services to penitentiary inmates. They recognize a duty on CSC to provide mental health services to inmates with a psychiatric or behavioural problem which grossly impairs their ability.

APPENDIX "A"

List Of Proposed Working Papers Of The Correctional Law Review

Correctional Philosophy

A Framework for the Correctional Law Review

Conditional Release

Victims and Corrections

Correctional Authority and Inmate Rights

Powers and Responsibilities of Correctional Staff

Correctional Issues Affecting Native Peoples

Federal-Provincial Issues in Corrections

Mental Health Services for Penitentiary Inmates

International Transfer of Offenders

APPENDIX "B"

Extract from *Mental Disorder Needs Identification Study* by T. Hogan and L. Guglielmo (Ministry of the Solicitor General, 1985) at pp. 63-65:

DESCRIPTION

The following descriptions are intended to assist in identifying those inmates who require extraordinary care.

"Disturbed" - For the purposes of this study a person is considered disturbed if their mental functioning is sufficiently impaired or their problem is so overwhelming as to interface grossly with their capacity to meet the ordinary demands of daily living. Their perceptual disorganization, emotional distortion, and/or memory deficits are such that the inmate's grasp of reality is effectively lost; and/or the person's problem is sufficient to cause considerable psychological distress for the inmate and, perhaps, be very disturbing for others.

1 **Suicidal Type:** An inmate who because of an active depression or because of an hysterical immature disregard for life, threatens and/or appears to be actively contemplating and planning suicide. Cognitive confusion, emotional liability and/or impulsivity may contribute to the risk. Frequently, there is a history of suicide attempts and/or gestures.

2 **Serious Depression:** An inmate whose behaviour is marked by extreme lethargy and despair, may isolate him/herself from the "normal" prison population and appear frequently in a "black", despondent mood. The inmate may appear to have little regard for self or others, is erratic and unpredictable. "Black" moods may be quickly and unpredictably replaced with frivolous episodes of levity.

3 **Serious Thought Disorder:** Inmate's thinking is markedly confused, and behaviour responses are disoriented; emotional reactions are inappropriate. The overall impression is that of a seriously disordered person. There may be evidence of bizarre behaviour, paranoid thinking, and/or extreme unpredictability. The onset may have been quite recent, or there may be a long history of such episodes. There may be periods of lucidity during which the inmate seems normal and "together", though the overall impression is that the inmate is seriously disturbed.

4 **Socially and Mentally - Incompetent Mental Retardation:** The inmate who because of a psychological condition cannot live a "normal" prison life as he/she creates serious administrative

problems; both the inmate and the general prison population suffer from the inmate's inclusion. He/she appears incompetent, mismanages many aspects of daily living, and the inability to cope is generally irksome. The inmate obviously requires care in dealing with day to day functioning. Certain types of distressed mentally retarded, and/or persons with chronic mental disorder might be included in this category.

5 **Violence and/or Aggression Prone:** The inmate has a significant problem managing extreme anger. A violent reaction may be triggered without sufficient provocation and the inmate is very unpredictable in this regard. The aggressive behaviour is typically not in keeping with circumstances. Rages may be intense, prolonged and occurring with increasing frequency. A person included in this category finds anger, violence, and aggression impulses quickly get out of hand so the inmate is seen as being explosive, sadistic and out of control.

N.B. - Exclude from Survey

There may be some difficulty distinguishing this person from the "tough guy" or the person who may from time to time take extraordinary measures to defend his/her self.

6 **Serious Sexual Dysfunction:** An inmate would be included in this category who have a substantial sexual disorder which (1) is a source of considerable distress for the inmate; and/or (2) creates a problem for the general inmate population; and/or (3) will likely create problems for the public when the inmate completes, his/her sentence.

N.B. - Exclude from Survey

Those inmates who may have some sexual behaviours which cause the inmate no stated concern; do not create a substantial problem for the general inmate population; will not likely be cause for criminal charges if the inmate engages in the behaviours after discharge.

7 **Substance Abuse:** An inmate is considered to have a substance abuse problem who demonstrates a pathological use of and/or a dependence on alcohol and/or drugs, i.e.,

- need for daily use of substance for adequate functioning;
- inability to cut down or stop use of substance;
- repeated (and unsuccessful) effort to control use of substance;
- binging (remaining intoxicated for more than 2 days);
- amnesia (black-outs) ;

- continuation of use of substance despite its detrimental effect on some other health or social situation;
- impairment in social and/or occupational functioning due to substance abuse;
- need for increased amounts of substance to achieve the desired effect.

A person would be included in this category who currently demonstrates an abuse problem. Also include those inmates who because of current attitudes will probably have a considerable abuse problem upon release (or when alcohol and drugs may be more readily available).

8 **Controlled Thought Disorder and/or Controlled Affective Disorder (Depression):** Inmate who may have a history of mental illness and/or probably has had intensive treatment in the past but who is managing satisfactorily in the "normal" population, probably because of medication and/or institutional professional (medical, psychiatric, nursing, psychological) care. It is anticipated that, all things being equal, the inmate's condition will not deteriorate, although without an ongoing maintenance programme, the inmate's condition would worsen.

9 **Other Serious Disorder(s):** An inmate may have some significant psychological, psychiatric disorder other than the ones indicated above.

10 **Other Significant Personal Problem Requiring Psychological Attention:** An inmate may have a significant personal problem which is distressing and detrimentally influencing daily functioning. He/she requires the special assistance of a nurse-practitioner and/or a psychologist to help.

APPENDIX "C"

STATEMENT OF PURPOSE AND PRINCIPLES OF CORRECTIONS

The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by:

a) carrying out the sentence of the court having regard to the stated reasons of the sentencing judge, as well as all relevant material presented during the trial and sentencing of offenders, and by providing the judiciary with clear information about correctional operations and resources;

b) providing the degree of custody or control necessary to contain the risk presented by the offender;

c) encouraging offenders to adopt acceptable behaviour patterns and to participate in education, training, social development and work experiences designed to assist them to become law-abiding citizens;

d) encouraging offenders to prepare for eventual release and successful re-integration in society through the provision of a wide range of program opportunities responsive to their individual needs;

e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation, and by assisting offenders in the community to obtain or provide for themselves the basic services available to all members of society;

The purpose is to be achieved in a manner consistent with the following principles:

1 Individuals under sentence retain all the rights and privileges of a member of society, except those that are necessarily removed or restricted by the fact of incarceration. These rights and privileges and any limitations on them should be clearly and accessibly set forth in law.

2 The punishment consists only of the loss of liberty, restriction of mobility, or any other legal disposition of the court. No other punishment should be imposed by the correctional authorities with regard to an individual's crime.

3 Any punishment or loss of liability that results from an offender's violation of institutional rules and/or supervision conditions must be imposed in accordance with law.

4 In administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition, consistent with public protection and institutional safety and order.

5 Discretionary decisions affecting the carrying out of the sentence should be made openly, and subject to appropriate controls.

6 All individuals under correctional supervision or control should have ready access to fair grievance mechanisms and remedial procedures.

7 Lay participation in corrections and the determination of community interests with regard to correctional matters is integral to the maintenance of incarcerated persons and should at all times be fostered and facilitated by the correctional services.

8 The correctional system must develop and support correctional staff in recognition of the critical role they play in the attainment of the system's overall purpose and objectives.

APPENDIX "D"

PROPOSALS CONCERNING MENTAL HEALTH SERVICES FOR PENITENTIARY INMATES

The following is a list of proposals presented for discussion

1 Federal correctional legislation should explicitly recognize that the Commissioner of Corrections has a duty to provide needed mental health services to offenders within the custody of Correctional Service of Canada. The determination of mental health service needs shall be made by authorized medical staff or health services teams. This determination should be made subject to an offender's right to request a second opinion.

2 "Mental health services" should be defined in federal correctional legislation to mean any approved treatment, program or service professionally designed and administered for the treatment of a mental disorder of thought mood, perception, orientation, or memory that significantly impairs judgement, behaviour capacity to recognize reality or ability to meet the ordinary demands of life.

3 Federal correctional legislation should provide for an obligation to offer mental health services to persons in the custody of Correctional Service of Canada at a level or standard that is consistent with standards commonly available to the public at large, and to offer programs to meet the special needs of inmates.

4 Federal correctional statutes should expressly recognize the principle of voluntary, informed consent to treatment made by a person with a capacity to understand the subject matter in issue and an appreciation of the consequences of his or her decision.

5 Federal correctional legislation should expressly recognize the right of every such person within the custody of CSC to refuse treatment.

6 Federal correctional legislation should provide that

   a) experimentation should be conducted only within strict criteria for professionally approved programs, and with the offender's consent.

   b) Offenders may participate in therapeutic experimental research programs, provided that (1) the program has been approved as medically sound and in conformance with medically accepted standards; (2) the offender has given full voluntary and informed written consent; (3) in the case of psychosurgery, electrical stimulation of the brain, and aversive conditioning, approval has been given by an appropriate court after a hearing to determine that the program is sound and that the offender has given informed consent.

c) A program should be considered medically sound and in compliance with medically accepted standards only after it has been reviewed by a committee established by law to evaluate its medical validity.

d) An offender should be considered to have given informed consent only after that consent has been reviewed by an independent committee, consisting of lay persons, including offenders or ex-offenders.

e) For the purposes of correctional legislation, "informed consent" means that the offender is informed of (1) the likely effects, including possible side effects, of the procedure; (2) the likelihood and degree of improvement, remission, control or cure resulting from the procedure; (3) the uncertainty of the benefits and hazards of the procedure; (4) the reasonable alternatives to the procedures; and (5) the ability to withdraw at any time.

Treatment Without Consent

7 Federal correctional legislation should provide the following:

a) Where an offender has lost the capacity to give an informed consent, upon an application under the mental health act of a province, the offender may be found to be mentally incompetent, and in such event, the offender's next of kin, or guardian, or the director of mental health services for the mental health facility may authorize appropriate treatment.

b) Where treatment is given without the offender's personal consent, only that treatment shall be administered as is the least intrusive means available and feasible to restoring the patient to a state of competency.

c) In an emergency, an offender who is suffering from a severe mental disorder and who refuses consent to treatment may be transferred to a provincial mental health facility without prior judicial authorization providing

(i) the offender poses a substantial risk of harm to others or to himself or herself; and

(ii) the Director of the mental health facility consents to the transfer and directs such reasonable treatment as may be necessary.

8 Federal correctional legislation should provide that the Commissioner of Corrections shall not authorize force feeding of inmates, and that no person shall force feed an inmate.

9 Federal correctional legislation should state that in all significant institutional decision-making processes including placement, classification, transfers, disciplinary proceedings and release decisions the mental health needs of the inmate shall be given reasonable consideration along with the security needs of the institution and the protection of society.

10 Section 20 of the *Penitentiary Act* should be repealed.

11 Federal correctional legislation should recognize:

a) a principle of confidentiality and impose a duty on penitentiary health care officials or other persons dealing with penitentiary health care information not to disclose it;

b) exceptions to the non-disclosure duty so as to

(1) require a sharing of health care information among health care officials, or other institutional or community staff or staff of private agencies under contract with the agencies for treatment purposes; and

(2) impose a duty to warn institutional or parole staff or other relevant individuals where a health care official has reason to believe that an inmate in an institution or on supervised release poses a risk to the security and safety of other persons; and

c) an obligation by health-care officials to disclose to an inmate, on request, personal health information in the inmate's institutional files, subject to an exception in cases where risk to the security and safety of other persons is likely to result from such disclosure.